Law Enforcement Newsletter

FROM THE OFFICE OF THE
Attorney General
For The Commonwealth of Massachusetts

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TABLE OF CONTENTS

SCOTT HARSHBARGER
ATTORNEY GENERAL

LAW ENFORCEMENT
NEWSLETTER

Letter from the Attorney General:
A Law Enforcement Vision for the Nineties

June 1991

To Members of the Law Enforcement & Criminal Justice Community:

This is my first newsletter to you as Attorney General, continuing a tradition of communication and frank exchange of ideas that began eight years ago with the birth of this newsletter while I was District Attorney of Middlesex County. As Attorney General, I am pleased now to be able to expand our Law Enforcement Newsletter into a statewide publication. I anticipate that we will publish on a quarterly basis and be joined in future editions by several District Attorneys.

My letter to you in this first newsletter is drawn in part from my January 16 swearing-in speech as Attorney General. As I did in that speech, I wish to articulate here the core beliefs that motivate my vision of the Office of the Attorney General and the programs through which I will translate those beliefs into action. First, then, the beliefs.

I believe we have now a unique opportunity to effect a major change in the relationship between the government and its people, and to create a meaningful public-private partnership.

I believe we must rebuild our economic state and life, but it is equally, if not more, important to restore the public's confidence in government and its essential role, by leadership that will truly lead, make choices, define priorities, be accountable, and mobilize us as a community on common ground and for our noble common goals.

I believe we have a constitutional obligation to reform our justice system so that it does in fact deliver our most important responsibility -- swift, fair and equal justice, protecting the public, while preserving our unique heritage of civil rights and civil liberties.

I believe the real victims of the sad litany of our failures, and those to whom we owe the greatest obligation, are those who, through no fault of their own, are poor, powerless, and vulnerable women, people of color, children, the elderly, urban citizens, and the victims of crime triggered by drug and alcohol abuse, violence and the disintegration of the family.

I believe that if we can find the resources to bail-out the Savings and Loan industry, enrich the top 1% of our citizens, provide relief to the victims of natural disasters, and to wage war as a nation, as necessary and justifiable as these causes may be, we can find, as a community, the financial and spiritual resources to attack the equally, if less dramatic, evils that today endanger the very fabric and foundation of our society -inequality, hate, hopelessness, lost values, and violence.

I believe the Attorney General, as the chief lawyer and law enforcement officer in this Commonwealth, must be a leader, in partnership with others, in meeting these challenges, maximizing the potential of this office to protect the public, restore confidence, effect major change, and to act for the public good in the multitude of areas where the law and society intersect.

I believe that to be able to lead, this office must be, first and foremost, an outstanding professional law office in which decisions are made and actions are taken, based solely on the law and clearly articulated policies, without regard to party, politics or favor; where the only standard of performance is professional excellence; and where the office's immense power is used aggressively and pro-actively, but in a fair, responsible and balanced manner, to make a difference in the quality of our lives.

And, I believe we have failed to meet our fundamental societal responsibilities, and yet I firmly believe, based on my experience, that we are all prepared to support credible, realistic and effective programs, policies and priorities that will change fundamentally people's perception about government and enable us to meet the major challenges we face, and fulfill our fundamental obligations to each other.

Now for the actions. During my first five months in office, I have been pleased with the rapid progress we have made in translating the promises of a campaign into the realities of daily governance in spite of the overwhelming array of issues that arise in this office and the severe budget constraints we, like you, have endured. Some of our major actions to date in the law enforcement/criminal justice arena include the following:

*Professionalization of the office. The Attorney General's Office should be the best professional law office in the Commonwealth, devoted to the rule of law and not the rule of politics. To this end, we have already instituted (1) a system of merit hiring for attorneys; (2) in-house legal training and supervision programs to promote professional quality and responsibility; (3) expansion and modernization of an archaic management information system; and (4) streamlining and consolidating the office functions administratively.

* Achieving Accessibility. As the top law enforcement officer in the Commonwealth, I have attempted to open up regular avenues of communication with key officials and agency heads. Examples of a new era of accessibility include: (1) regular meetings with Governor Weld and United States Attorney Wayne Budd to coordinate our focus on law enforcement and criminal justice issues; (2) initial meetings with most of the district attorneys, the sheriffs and the police chiefs in various formats to discuss relevant issues, and to seek guidance on the manner in which this office can most effectively assist them; (3) playing an active role with U.S. Attorney Budd, including co-hosting the successful spring LECC meeting on May 14.

* New Organization for the Criminal Bureau. We have expanded and restructured the Criminal Bureau to give priority to urban violence, public corruption, white collar crime and major narcotics cases and asset forfeitures. For your information, the key contacts in the Bureau are listed at the end of the Newsletter in the "Assistance and Contacts" section, and a more detailed overview of the Bureau will be provided in the next newsletter -- as well as a description of the other Bureaus in this office.

* A New Focus on Urban Violence. To begin to involve the Attorney General in the effort to combat aggressively urban violence, I have taken the unusual step of providing Assistant Attorneys General to some of the district attorneys. Currently, there are Assistant Attorneys General from the Criminal Bureau in Suffolk County and Essex County prosecuting serious Superior Court urban violence cases. We plan to expand the scope of our efforts in the near future by providing prosecutors in the district courts.

In addition to providing additional prosecutorial resources to district attorneys, we are also exploring with business and community leaders the most effective role the Attorney General's office can play in combating urban violence. It is clearly a complex area with no simple solution or magic panaceas; and as we knew, law enforcement will not solve the problems alone, but I remain convinced that it is essential that this office play a role in seeking answers to the ongoing violence in our urban communities.

* Civil Rights Initiatives. I am pleased to have joined with the three Western Massachusetts District Attorneys in co-sponsoring their important civil rights training conference in Amherst on April 25. We will continue to work with police and prosecutors to ensure that the civil rights and constitutional liberties of all individuals are protected, and training will be an integral part of this initiative.

In cooperation with Northeastern University's School of Criminal Justice and the Boston Police Department, my Civil Rights Division is also developing a model statewide police training program. The program is described in another article in this Newsletter (see Training Programs For Police in the Community.)

* Family and Community Crimes Bureau. This new bureau enables us to provide a statewide focus on child abuse, domestic violence, elder abuse, drug education, juvenile crime and victim assistance. Although the Bureau is our smallest, largely due to budget limitations, I believe that it is important that the Attorney General have a role in developing policy and plans in these troubling areas. Through the Bureau, our office is co-sponsoring a series of seminars on family violence with the Harvard University School of Public Health. The Bureau is also working on projects which include the identification and reporting of crimes against the elderly (elder abuse cases, and consumer fraud); an expansion of "Project Alliance," our drug and alcohol education partnership with superintendents of schools, to a statewide basis; and re-vitalizing our role in victim compensation cases (in spite of budget cuts which have eliminated half of our staff in this area.)

* Court Reform. I have given major priority to the support of court reform legislation, joining with the Governor and the Supreme Judicial Court in this effort. I believe that major court reform is essential if we are to begin restoring confidence in government's ability to protect the public. I believe that, at the present time, the proposals offered by the Governor and the SJC offer the best hope for an effectively managed centralized court system. I believe that if we do not act now, then the opportunity for reform will be lost for another decade. I urge members of the law enforcement and criminal justice communities to join the constituency which is actively supporting court reform legislation during this legislative session.

It is simply unacceptable that there are tremendously overburdened urban courts on the verge of paralysis, forced to function daily with inadequate resources. It is equally unacceptable that some courthouse facilities are seriously underutilized. Public awareness of such inefficiency and waste further erodes public confidence. Under the current system, there is no adequate mechanism to fairly and equitably distribute our limited resources.

The most profound impact of the judiciary's inability to allocate resources is in the urban areas throughout Massachusetts, not just in the City of Boston. In these areas,

violence has created backlogs of cases which fracture the quality of life and further diminish confidence in the justice system's ability to protect the public and hold criminals accountable for their actions. The ability to shift personnel is a simple and basic power that is fundamental to the effective management of any organization.

This situation is exacerbated by the current budget crisis. At a time of dwindling resources, when the public rightfully demands that government "fix itself," our courts must be given the tools for effective management. The fundamental principles of the proposed legislation are essential steps in that direction: central leadership and accountability, fiscal and staffing flexibility are crucial to the efficient, effective delivery of justice and the restoration of public confidence in our judicial system.

* The Budget Crisis. For the past two years, I have consistently spoken out against "across-the-board" budget cuts which include public safety and public protection and fail to set priorities and make crucial, if difficult choices. The cuts suffered by the district attorneys and this office, as well as by the judiciary, local police departments, and related victim services and programs, have had a serious impact on our collective ability to protect the public. In testimony before the Legislature and in other forums, I have repeatedly stated that the law enforcement and the criminal justice communities cannot absorb further budget cuts without serious ramifications. In spite of the lack of response to date and the severity of the fiscal crisis, I will continue to emphasize the plight of police, prosecutors, the judiciary, and vulnerable and powerless victims in the hope that at some point fiscal sanity will be restored.

* Upcoming Police Chiefs Conference. Finally, I would like to note that on Wednesday, July 17, I will host our first Statewide Police Chiefs Conference. This is part of our continuing effort to be in contact with the chiefs to seek their input and guidance on issues of relevance to them. Further information about the conference will be contained in a forthcoming letter to all police chiefs.

Clearly, there is much more we need to accomplish in the coming months and years. However, I believe that we are off to a solid start and have laid a strong foundation to continue our agenda, which includes a major emphasis on law enforcement and criminal justice issues. As I have in the past, I will again seek your guidance and help in defining and achieving our goals, so that together we can improve public safety and the quality of justice in the Commonwealth of Massachusetts.

While we all know there are no overnight cures or easy, sudden remedies, I firmly believe we can succeed. The pieces are in place; we have done it before. We know what works. We have seen what a radical difference solid, professional performance can make, and what real multi-disciplinary efforts can produce, given a willingness to lead. If we are allowed the minimal resources needed to provide the protection the public deserves, we will restore confidence in government and the justice system.

I closed my Swearing-In speech, as I close this letter, with the following thought: Long ago, the prophet Amos prayed for a world where "justice may roll down like the waters, and righteousness be an everlasting stream." May all of us, working together, contribute to realizing that goal.

I am honored to be your Attorney General. I thank you for giving me this opportunity. I look forward to working with you.

Sincerely,

Scott Harsharger

P.S. As we continue to publish the Law Enforcement Newsletter on a regular basis, I would like to encourage all of you to offer ideas and suggestions for future editions. The LEN is produced to be a substantive, helpful tool for members of the law enforcement and criminal justice community. Your input in shaping the Newsletter in the future is critical if it is to be a continuing success, which I am confident it will be with your help. Thank you.

TRAINING PROGRAMS FOR POLICE IN THE COMMUNITY

by Richard Cole
Chief, Civil Rights Division

In conjunction with the Criminal Bureau, the Civil Rights Division of the Attorney General's Office has developed a comprehensive program focusing on police/community relationships to address the perceived tension and distrust that has historically existed between the police and certain communities, particularly minority communities. We hope this new program will promote increased civil rights protection for our citizens, ensure effective law enforcement, and assist the police in performing their difficult and often thankless roles with credibility in, and the support of, the community.

The Attorney General and I welcome and seek your ideas and comments on the program proposed in this article. The new comprehensive approach we propose to take developed from our concern that the credibility of certain police departments in the state is relatively low, particularly in the minority community. Rightly or wrongly, a percentage of residents of these communities fear and distrust the police and do not believe that their local police department serves them responsibly or effectively.

We believe that the trust and cooperation of racial and linguistic minority communities are essential components of effective police work, and that only through the cooperation of community residents will the police be able to effectively combat the crisis of guns, drugs and violence that is destroying the quality of life in many of our communities. We expect that our new program will assist in reestablishing the strong ties and mutual trust between the police and the community that is crucial to the ability of the police to perform their job effectively. We also hope that the program will reestablish the racial and linguistic minority communities' confidence that the Attorney General's Office will play a leading role in protecting the civil rights of all persons.

The first part of the program involves the creation of a series of model training programs for all police departments statewide. Developed with the cooperation and assistance of Northeastern University's College of Criminal Justice and the Boston Police Department, this training program will supplement the training already in place through the Criminal Justice Training Council and several local and regional police academies, and will focus on the civil rights liability standards for supervisory personnel and police officers, the Constitutional requirements regarding 'street' stop and frisk and the use of force. It will also address specific issues

regarding the relationship of the police to minorities, including how to deal with problems of bias or prejudice and hate crimes.

We all recognize that the vast majority of police officers perform their difficult and often thankless job effectively and professionally. But it is sometimes necessary to take action against those officers who violate the public's trust. Therefore, in addition to the model statewide training program and other programs we will be developing with and for the law enforcement community, the Attorney General and his Civil Rights Division will seek to identify both individual persons and departmental policies that violate the law. When necessary and appropriate, the Attorney General will initiate civil suits and/or criminal prosecutions to end the infractions.

The Civil Rights Division will seek to identify departments or officers involved in unlawful conduct in several ways. First, we have established a protocol in which all allegations of police misconduct are carefully reviewed by the Chief of the Civil Rights Division to determine which complaints appear to merit investigation, and whether there exists any pattern of unlawful conduct. The Civil Rights Division will then initiate timely investigations of all apparently meritorious allegations of unconstitutional or unlawful conduct on the part of police departments and officers, and seek appropriate relief and remedies.

The Division will also compile and maintain information from various sources, including information from police chiefs and private attorneys, regarding all lawsuits and claims which have been brought against police departments and officers, and the results of these lawsuits and claims and the results of internal investigations.

Often in a case seeking monetary damages against a police department or municipality for allegations of illegal police practices, a plaintiff's attorney will succeed in establishing liability of supervisors by demonstrating that a department failed to investigate adequately and respond to meritorious citizen complaints, to provide necessary remedial training, to take appropriate disciplinary action against individual officers, and/or to change illegal policies and deficient supervisory procedures. By changing these policies and practices prior to suit, a city or town should be able to avoid or reduce its exposure to civil liability.

A comprehensive questionnaire will soon be sent to all police departments, the responses to which will assist the Attorney General in identifying specific department deficiencies, if any, and to make statistical and policy, procedural and performance comparisons among departments.

Information such as the number of citizen complaints, whether any disciplinary action was taken in response to complaints, the number and results of all lawsuits against a department or particular officer, and the existence of policies, procedures and training, will be reviewed and compared. With this concrete factual data, the Division will be able to work with a local police department, demonstrate the areas requiring change and offer specialized training, specific to the identified needs of the department. This training would be in addition to the model training program to be offered to all police departments in the state. We anticipate that departments will welcome this special training, both to enhance sensitivity to the individual rights of residents and to protect departments and municipalities from civil liability and large damage and attorney fee awards.

While it is our expectation that legal action will generally be unnecessary, and would be used only as a last resort, if a department should refuse to participate in the necessary special training and fail to modify any policies or practices found to be unlawful, the Attorney General's Office will contemplate court action. Such civil action would include seeking injunctive relief to mandate training or policy changes or to prohibit certain conduct.

Finally, the police can and must serve as role models. We all recognize that police leadership and performance strongly influence the behavior and attitudes of our youth, including their attitude about whether the law should be respected. Therefore, whenever the facts require it and civil rights statutes permit, the Criminal Bureau, in cooperation with the Civil Rights Division, will criminally prosecute police officers who violate the civil rights of any individual. Obviously, we cannot permit any public official who has a position of public trust to violate civil rights.

In conclusion, our law enforcement efforts must be aggressive and must be effective in reducing crime and its terrible consequences. We must work together to create a climate intolerant of drugs and crimes of violence while at the same time promoting a climate which gives primary value to civil rights and Constitutional rights. I am convinced that the police and the Attorney General's Office can and must play a primary leadership role in reducing the terrorizing effects of violence and drugs, and that we can do that without sacrificing the constitutional rights of any individual. This is our challenge. I hope we together can meet it.

State versus Federal Standards Governing Law Enforcement

by LaDonna J. Hatton, Assistant Attorney General

While the federal and state constitutional provisions concerning search and seizure and due process are not significantly different,[1] in many areas of the

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1/ The Fourth Amendment to the United States Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article 14 of the Massachusetts Declaration of Rights provides that:

> Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

The Fifth Amendment to the United States Constitution provides in part that:

> No person shall . . . deprived of life, liberty, or property, without due process of law . . . .

Article 12 of the Massachusetts Declaration of Rights provides in part:

> [N]o subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

law that impact on law enforcement, the Massachusetts courts have interpreted the Massachusetts Constitution to provide greater protections to suspects than the United States Supreme Court provides in interpreting the U.S. Constitution. Probably the most obvious example is the difference in the federal and state requirements for establishing probable cause in a search warrant based on information from an unnamed informant. Under federal law, the magistrate reviews all the circumstances set forth in the affidavit to determine whether there is a fair probability that contraband or evidence of a crime will be found in a particular place. Illinois v. Gates, 462 U.S. 213 (1983). On the other hand, under state law, the affiant must demonstrate both the informant's basis of knowledge and his or her reliability to establish probable cause. Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969). Commonwealth v. Upton, 394 Mass. 363 (1985).

Following are other examples of state court rules which are more restrictive to law enforcement than the analogous federal rule.

I. SEARCH AND SEIZURE

Pursuit As Seizure. One of the most recent examples of the difference between the state and federal standards is in the area of police pursuits of suspects. In April, the United States Supreme Court held that a seizure does not occur when an officer pursues a suspect, but only when physical force is applied to the suspect. Therefore, the officer does not need probable cause or even reasonable suspicion before beginning the pursuit. California v. Hodari, 59 U.S.L.W. 4335 (April 23, 1991). On the other hand, under state law a seizure occurs as soon as an officer begins a pursuit which is designed to effect a stop; therefore, the officer must have reasonable suspicion to believe the suspect has committed, is committing, or is about to commit a crime before beginning the pursuit. Commonwealth v. Thibeau, 384 Mass. 762 (1981).

One Party Consent To Electronic Surveillance. Under federal law, no search warrant is required where a consenting police agent monitors and/or records conversations with a suspect with electronic equipment carried on the agent's person. United States v. White, 401 U.S. 745 (1971). In Massachusetts, however, a search warrant is required for electronic surveillance where less than all partakers in the conversation consent to the surveillance. Commonwealth v. Blood, 400 Mass. 61 (1987).

Inevitable Discovery Of Illegally Obtained Evidence. Under federal law, if the prosecution can show by a preponderance of evidence that the illegally obtained evidence inevitably would have been discovered by lawful means, the evidence is admissible, without regard to bad faith of police. Nix v. Williams, 467 U.S. 431 (1984). Under state law, if the Commonwealth proves by a preponderance of evidence that illegally obtained evidence would inevitably have been discovered by lawful means (without the need for a search warrant) the evidence is admissible if the Commonwealth's case is not aided (or the defendant's case harmed) by the unlawful, premature discovery of the evidence; the officer's bad faith must be taken into consideration in deciding whether to admit the evidence. Commonwealth v. O'Connor, 406 Mass. 112 (1989).

Good Faith Exception To Exclusionary Rule. Under federal law, where the officer conducting the search acted in objectively reasonable reliance on a warrant issued by a detached and neutral magistrate that subsequently is determined to be invalid, the evidence seized is admissible. United States v. Leon, 468 U.S. 897 (1984). Under state law, there is no good faith exception to the exclusionary rule. Therefore, the fact that an officer in good faith relied on a warrant issued by a magistrate does not alter the fact that the evidence is inadmissible if the warrant is invalid. Commonwealth v. Pellegrini, 405 Mass. 86 (1989), Commonwealth v. Treadwell, 402 Mass. 355 (1988).

Automatic Standing For Possessory Crimes. Under federal law, defendants charged with crimes of possession may only claim the benefit of the exclusionary rule if their own Fourth Amendment rights have in fact been violated. United States v. Salvucci, 448 U.S. 83 (1980). On the other hand, under state law, a defendant charged with a crime in which possession of the seized evidence at the time of the contested search is an essential element of guilt has standing to contest the legality of the search. Commonwealth v. Amendola, 406 Mass. 592 (1990).

Target Standing. Under federal law, a defendant does not have standing to challenge the legality of a search or seizure of another merely because the defendant is the target of an investigation; only defendants whose Fourth Amendment rights have been violated may benefit from the exclusionary rule. Rakas v. Illinois, 439 U.S. 128 (1978). The state courts have suggested that they might recognize the right of one who is the target of an investigation to challenge unconstitutional conduct toward a third person. Commonwealth v. Manning, 406 Mass. 425 (1990). See also Commonwealth v. Price, 408 Mass. 668 (1990).

II. ADMISSIONS AND CONFESSIONS

Harmless Error Analysis As Applied to Introduction of Involuntary Confession. Under Federal Law, an appellate court reviewing the introduction of an involuntary confession reviews the remainder of the evidence against the defendant to determine whether the admission of the confession was harmless beyond a reasonable doubt. Arizona v. Fulminante, 111 S. Ct. 1246 (1991). Under state law, however, the appellate court does not conduct such a "harmless error" review, since a conviction founded in whole or in part on a statement which is the product of physical or psychological coercion is invalid. Commonwealth v. Mahnke, 368 Mass. 662 (1975).

What Interrogating Officer Can Do In Light Of Attorney's Efforts To Contact Suspect. Under federal law, a suspect validly waives his or her Miranda rights even where the police fail to inform the suspect of a lawyer's attempt to reach the suspect. Moran v. Burbine, 475 U.S. 412 (1986). Under state law, a statement made by a suspect to a police officer is inadmissible where the officer failed to inform the suspect that his lawyer, who did not represent the suspect in the matter for which the suspect was being interrogated, but had represented him in an unrelated case, had earlier in the day expressed to the officer a desire to be present at the interrogation. Commonwealth v. Sherman, 389 Mass. 287 (1983). See also Commonwealth v. Mahnke, 368 Mass. 662 (1975); Commonwealth v. McKenna, 355 Mass. 313 (1969).

Burden of Proof of Voluntariness Of Statements. Under federal law, the prosecution must prove the voluntariness of a statement by a preponderance of evidence, and once the judge decides the statement is voluntary, the defendant is not entitled to have the jury decide voluntariness. Lego v. Twomey, 404 U.S. 477 (1972). On the other hand, in Massachusetts the judge must find that the prosecution proved beyond a reasonable doubt both a knowing and intelligent waiver of Miranda and that the statement was otherwise voluntary. If the judge finds the statement was voluntary, he or she must then instruct jury that they must find the statement voluntary beyond a reasonable doubt before the statement can be considered against the defendant. Commonwealth v. Tavares, 385 Mass. 140 (1982), Commonwealth v. Day, 387 Mass. 915 (1983).

Voluntariness Of Statements To Private Citizens. Under federal law, even the most outrageous behavior by a private citizen seeking evidence against a defendant does not make the evidence inadmissible. Colorado v. Connelly, 107 S. Ct. 515 (1986). On the other hand, under state law, whenever the voluntariness of a defendant's statements to private citizens is an issue, the judge (and then the jury) must determine

whether the statements are voluntary. Commonwealth v. Allen, 395 Mass. 448 (1985); Commonwealth v. Mahnke, 368 Mass. 662 (1975).

CONCLUSION

The foregoing examples of areas in which the state court rule is more restrictive to law enforcement than the analogous federal rule is not exhaustive, but should emphasize the need for law enforcement personnel to keep themselves updated on the law, both state and federal.

RECENT SUPREME COURT CASES

During its current term, the United States Supreme Court has decided several cases with important ramifications for criminal law. The highlights are as follows.2/

1. In the area of confessions, the Court has announced two major decisions. In Arizona v. Fulminante, 111 S. Ct. 1246 (1991), the Supreme Court for the first time departed from its previous rule that admission of a coerced confession is automatically to be considered prejudicial error requiring reversal of a defendant's conviction. Instead, the Court now permits the admission of a coerced confession to be reviewed to see if the error was harmless beyond a reasonable doubt and therefore not grounds for disturbing a conviction. In Arizona v. Fulminante itself, the Court first found that the confession was indeed coerced (by using a fellow inmate to solicit the confession in exchange for promised protection against other inmates). And, after checking to see if the admission of the coerced confession could be dismissed as harmless error, the Court concluded that it could not. The facts of the case raised the real possibility that the jury may have critically relied on the confession in convicting the defendant.

In the second of its two "confession" cases (Minnick v. Mississippi, 59 LW 4037 (1990)), the Supreme Court clarified earlier rulings that whenever a criminal suspect in custody requests counsel, all interrogation must cease until the suspect is afforded opportunity to consult with counsel. The clarification in Minnick is that police officers may not attempt to reinitiate interrogation of the suspect in the absence of counsel, even if in the meantime the suspect has had an opportunity to consult with counsel.

2. As usual in recent years, the Supreme Court has considered a number of death penalty issues. Argument has been heard but the Court has not yet issued its opinion on whether to reverse prior cases that prohibit introduction of victim-impact statements during the capital sentencing phase. A 1987 Supreme Court case banned such victim testimony in death penalty cases as likely to prejudice a jury with irrelevancies.

In Parker v. Dugger, 59 LW 4082 (1991), the Supreme Court reversed a Florida death penalty sentence, based upon the following sequence of events. A jury found the defendant

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2/ Additional case information, comparing recent Supreme Court cases with Massachusetts law, can be found in the preceding article.

guilty of two murders but recommended against the death penalty. The judge overrode the recommendation as to one murder and imposed the death penalty, after finding that six aggravating circumstances existed. On review, the Florida Supreme Court found there was insufficient evidence of two of the aggravating circumstances cited by the judge. Nonetheless, the state supreme court affirmed the death sentence, since four of the aggravating circumstances were properly found and since the trial judge had found no mitigating circumstances to balance against the aggravating factors. But the United States Supreme Court reversed, since it found the state court in error in its conclusion that the trial judge had found no mitigating factors. In fact, the trial judge's ruling was that the six agggravating circumstances outweighed evidence in favor of mitigation. Therefore, when the state supreme court struck two of the six aggravating factors from the scales, it was obligated to re-weigh the remaining proper aggravating factors against the mitigating factors -- a weighing the state supreme court erred in failing to do.

In a third death penalty case (Shell v. Mississippi, 112 L Ed 2d 1 (1990)), the Supreme Court once again struck down the validity of a death sentence imposed, in part, on the basis of the aggravating factor that the crime was "especially heinous, atrocious, or cruel." Prior Court cases have disapproved such an aggravating factor as overly vague. In the present case, the trial judge attempted to cure the vagueness by instructing the jury that heinous means "exceptionally wicked," that atrocious means "outrageously wicked and vile," but the Court found that this type of limiting instruction was not constitutionally sufficient to cure the vagueness problem.

In a fourth case (Perry v. Louisiana, 59 LW 4007 (1990)), the Supreme Court vacated a state trial court decision that a mentally incompetent inmate on death row could be involuntarily treated with anti-psychotic drugs, in an attempt to make the inmate competent enough to be executed!

3. Search and seizure has also commanded the Supreme Court's attention this term. In California v. Hodari D., 59 LW 4335(1991), the Court once again considered the thorny issue of when a stop or seizure has been made for Fourth Amendment purposes. During a routine patrol in an unmarked car, Oakland police officers (in street clothes but with the words POLICE on front and back of their jerseys) came upon a group of four or five youths. The youths apparently panicked as soon as they saw the car (which at this point made no attempt to stop or block them) and fled. Their suspicions aroused, the officers gave chase on foot. During the chase, one of the youths threw something away which resembled a rock. When recovered later, it turned out to be cocaine and the search and seizure issue in

the case was whether, prior to the throwing away of the cocaine, the youth had been subject to an unreasonable stop or seizure. A majority of the Supreme Court concluded that this kind of street pursuit of a suspect, unaccompanied by any physical force, does not constitute a "seizure" of the suspect, when the suspect does not stop or yield to whatever show of police authority is implicit in the pursuit. For further analysis of this case, please refer to the preceding article comparing state and federal law on issues of search and seizure.

In California v. Acevedo, 59 LW 4559 (May 30, 1991), the Supreme Court overturned a twelve-year-old precedent and gave police broader latitude to search bags, suitcases, and other closed containers found in automobiles.

At issue in the case was whether the police could conduct a warrantless search of a bag found in a car for marijuana, when they had probable cause for believing the bag contained marijuana, but where they did not have a warrant or probable cause to search the car itself. California courts had ruled the search of the bag unlawful, applying the standards the Supreme Court itself enunciated in 1979 in the case of Arkansas v. Sanders. But by a 6 to 3 vote, the Supreme Court overturned the Sanders decision. That decision, Justice Blackmun wrote, had "confused courts and police officers and impeded effective law enforcement." In particular, the problem with the old standards was that they had drawn a "curious line" between valid and invalid searches of containers in cars. On the one hand, the police could open any container found in a car (even containers they did not suspect of harboring contraband), so long as they had probable cause to search the car in general. But, on the other hand, the police were powerless to open without a warrant containers that they did have probable cause to suspect sheltered contraband, if they lacked probable cause to search the car. The effect of this new ruling was to end what the court saw as the illogic of its own precedent.

In Florida v. Jimeno, 59 LW 4471 (May 23, 1991), the Supreme Court ruled by a 7 to 2 vote that a suspect who consents to a police search of his car implicitly consents as well to a search of closed containers found in the car. In Jimeno, the police found two pounds of cocaine in a bag inside a car that they were searching with the occupant's permission. The Court found that the search of the bag was an objectively reasonable part of the consented-to search.

4. Racial discrimination in jury selection was the subject of two major decisions this term. In Powers v. Ohio, 59 LW 4268(1991), the Supreme Court expanded on its 1986 ruling (Batson v. Kentucky) prohibiting prosecutors from using peremptory challenges in criminal cases to exclude potential

jurors solely on account of their race. The expansion gave defendants such as Powers legal standing to challenge the prosecutor's race-based peremptory challenges, even in situations where the defendant is not of the same race as the excluded juror.

In Moore v. Keller Industries, No. 90-1202 (1991), the Court further expanded on Batson, by prohibiting race-based peremptory challenges in civil as well criminal jury trials. Although peremptory challenges in civil cases are typically exercised by private lawyers rather than agents of the state, the Court nonetheless found that the Constitution's equal protection guarantees applied to the behavior of private lawyers exercising peremptory challenges on the basis of race, since the state had essentially delegated authority to private litigants to conduct the peremptory challenge phase of the public trial.

5. In Cage v. Louisiana, 112 L Ed 2d 339 (1990), a jury convicted the defendant of first degree murder and sentenced him to die. The Supreme Court reversed the conviction, on account of errors in the instruction regarding reasonable doubt. The judge used phrases such as "grave uncertainty" or "actual, substantial doubt" to describe the concept of reasonable doubt. A unanimous Court balked at these phrases, citing their potential to confuse the jury by overstating the required degree of uncertainty necessary to trigger a reasonable doubt.

6. In United Auto Workers v. Johnson Controls, 113 L Ed 2d 158 (1991), a unanimous Supreme Court ruled that a private company violated provisions of Title VII of the Civil Rights Act outlawing sex discrimination in employment, when the company banned all women in their childbearing years from working in jobs where lead exposure created a risk of birth defects in a fetus. The Court emphasized that a woman's gender was irrelevant to her qualifications to perform the job at issue and therefore the company's fetal protection policy could not be justified under those provisions of Title VII that permit gender to be considered when it is a "bona fide occupational qualification." Moreover, the Court took note of the facial discrimination involved in a fetal protection policy which excluded only women from the lead- hazardous jobs, even though men exposed to lead create a similar risk of birth defects in any child they might father.

RECENT MASSACHUSETTS CASES

I. Search and Seizure

1. In Commonwealth v. Crawford, 410 Mass 75 (1991), a state trooper learned from a confidential informant that one Vincent Crawford was planning to replenish his supply of cocaine that evening. According to the informant, Crawford had sent his girlfriend to New York for the cocaine and he was planning to meet her upon her return at South Station. The informant further indicated that Crawford would have cocaine on him at the time for sale and he would be driving a grey Datsun Maxima with a Massachusetts registration number that the informant named. The officer was able to confirm the registration of the Maxima to Crawford. Together with four other officers, the state trooper then established a stakeout at South Station that evening. Shortly before midnight (an Amtrak train from New York was due in at midnight) the officers noticed Crawford driving into the terminal area. He was not driving the Maxima described by the informant but he was followed by another person driving the car in question. The train was delayed until one in the morning, at which time the driver of the Maxima approached two women who had come from the train. The three then walked toward Crawford and the two women started to get into the car driven by Crawford. At this point, the officers intervened and arrested all four persons. A search of the handbag carried by one of the women revealed a kilogram of cocaine. A search of the car driven by Crawford revealed cocaine, as did a search of Crawford's socks.

Prior to trial, Crawford and the woman defendant moved to suppress the evidence of cocaine, on the grounds that the officers lacked probable cause for the search. The judge granted the suppression motion, after finding that the police officer had not sufficiently established the credibility of the informant upon whom he relied in believing a crime was in progress. At the suppression hearing, the officer had attempted to establish the informant's reliability, by testifying that the informant had given information in the past which had led to the arrest and indictment of two individuals on cocaine charges. However, the officer refused to divulge the names of the two persons arrested, on the grounds that it would compromise the informant. This initially caused the judge to have doubts about the officer's account but after an in camera hearing with the officer out of the presence of both defense and prosecution, the judge's doubts were temporarily resolved. But the judge then reconsidered the propriety of holding such an in camera hearing outside the presence of defense counsel, and decided he could not constitutionally rely on such a hearing. Thereupon, he concluded that testimony in the open suppression hearing had not established the reliability of the informant and therefore the suppression motion should be granted.

On appeal, the SJC reversed the suppression order and remanded the case for a new hearing. The SJC determined that the trial judge was correct in thinking that the kind of in camera hearing he held was flawed. But the proper procedure would be for the judge to hold an in camera hearing in the presence of the defense and prosecution. If at that time the officer reveals the information necessary to satisfy the judge that the informant had proven reliable in the past, then the evidence should not be suppressed.

2. In Commwealth v. Fenderson, 410 Mass. 82 (1991), the defendant argued on appeal that police affidavits submitted in support of a warrant authorizing a wiretap on his telephone were defective, since they did not show adequately that traditional investigative procedures had failed or were unlikely to succeed. The SJC rejected this argument, noting that the affidavits in question had established (1) that informants were too afraid of reprisals to testify against the defendant or even to introduce undercover police agents to him; (2) that visual surveillance of the defendant's house had been tried but was not possible to maintain over time without detection due to the isolated location of the defendant's house; (3) that the defendant's toll telephone records and even his garbage had been inspected; (4) that a search of his residence might be fruitless because the location of his cocaine supply was not clear and at any rate such a search would not help with the larger objectives of discovering the identity of the defendant's suppliers and lower-level dealers. Given the establishment of all this in the affidavit, the SJC concluded that the wiretap was properly issued, upon a showing that traditional investigative procedures had failed or were unlikely to succeed.

3. In Commonwealth v. Luna, 410 Mass. 131 (1991), the defendants challenged the validity of the search warrant whose execution led to the discovery of cocaine at their residence, by arguing that the warrant was void for not describing with sufficient specificity the premises to be searched. The basis of this objection was that the warrant named a single street address to be searched, though the house at that address contained two separate apartments. On appeal, the SJC found the crux of the issue to be whether the police knew or reasonably should have known that there were two distinct apartments at the address. The Court found that the record did not support any conclusion that the police actually knew there were two apartments. As to whether they reasonably should have known, the Court treated this as a question of fact that the defendants did not pursue below by seeking an evidentiary hearing. It was too late on appeal to request such a hearing, and thus the Court upheld the warrant. Of interest is the Court's conclusion that "if the police did not know and reasonably could not have known that there were two distinct apartments in the house, but had probable cause to believe that cocaine was being sold from the

house, a warrant to search the entire house" would not have violated the requirement that a search warrant describe with specificity the premises to be searched.

4. In Commonwealth v. Lapine, 410 Mass. 38 (1991), the state's highest court clarified the standards in this Commonwealth for determining whether tips provided by a confidential informant are sufficiently reliable to justify issuing a search warrant. According to the well-known "Aguilar/Spinelli" test, the affidavit accompanying a search warrant must establish that the informant had a "basis of knowledge" for his tip and that the informant is reliable or credible. In this particular case, the district court found that the informant's basis of knowledge was established but that the affdavit did not establish the informant's reliability.

The SJC disagreed with this conclusion and upheld the warrant. The affidavit averred that the informant had provided information in the past that had led to arrests and that the prior tips concerning the presence of drugs, the amount of drugs, and the description of the house where the drugs were kept had all proven accurate. In these circumstances, where the informant's prior information proved to be accurate, the SJC concluded that the informant's reliability was established, even if the prior information could be shown only to have led to arrests (plus discovery of drugs as described), and not convictions. This decision thus seems to indicate that an affidavit can establish the reliability of an informant's past information even when it can't be shown that the information led to convictions. But a word of caution is necessary here. The SJC also seemed to be indicating that the mere fact that an informant's information had led to arrests in the past would not be enough to establish his reliability. What saved the day here was the additional indicia of reliability provided by the confirmed accuracy of the defendant's past information about the presence of illegal drugs.

5. In Commonwealth v. Perez-Baez, 410 Mass. 43 (1991), the SJC again ruled that a search warrant was properly issued upon probable cause, where the informant relied upon in the warrant application was shown to have previously given information that had led to two separate arrests as well as to the seizure of cocaine during those arrests. Thus, at least in drug related cases, an informant's veracity appears to be sufficiently established in an affidavit when it is averred that his prior information led to arrests plus the seizure of contraband.

6. In Commonwealth v. Walsh, 409 Mass. 642 (1991), the application for a search warrant did not contain the street address or town of the house to be searched. Nonetheless, the SJC found that these omissions were not fatal to the warrant's validity, since the detailed description of the premises to be

searched in the warrant application was sufficiently "particular" to compensate for the lack of address. The detailed description that saved the warrant included the number to the left of the house door and the full name and date of birth of the possessor/occupier. The Court ruled that the warrant contained sufficient information to enable the officers to locate and identify the place to be searched with reasonable effort. There was also no reasonable possibility that a place other than the one intended to be searched under the warrant might be mistakenly searched.

7. In Commonwealth v. Mamacos, 409 Mass. 635 (1991), the defendant's truck was involved in a fatal accident. It was conceded that the police acted within their lawful authority in removing the truck from the road. But after the defendant requested the return of the truck, the police examined and tested the truck's brakes. Prior to trial of charges growing out of the fatal accident, the defendant moved to suppress the officer's testimony regarding the brake testing, on the grounds that such testing was an illegal search. The defendant's motion was denied and the SJC affirmed. According to the court, there was no search of the truck because the defendant did not have a reasonable expectation of privacy in the brakes of his truck after the truck was involved in a fatal accident and had been removed by the police from the highway.

8. In Commonwealth v. Singer, 29 Mass. App. Ct. 708 (1991), Boston police searched the defendant's apartment, pursuant to a warrant issued on the basis of a police affidavit detailing information provided by a confidential informant. The search revealed over 116 grams of cocaine. Prior to trial, the defendant sought to have evidence of the cocaine seizure suppressed, on the grounds that the confidential informant cited in the police affidavit for the search warrant did not exist. The defendant sought to prove this claim by moving for an evidentiary hearing on the issue and moving also for disclosure of the name of the alleged informant (see Franks v. Delaware, 438 U.S. 154 (1978), holding that, if a defendant makes a substantial, preliminary showing that a false statement has been knowingly or recklessly included in a search warrant affidavit, then the defendant is entitled to a hearing on the issue. If at the hearing the defendant proves the falsehood and if the remaining content of the affidavit is insufficient to establish probable cause, then the search warrant must be voided and evidence seized pursuant to it suppressed).

In this case, the defendant's requests for a so-called "Franks" hearing were denied. On appeal, the Appeals Court found that the denial of a hearing on the issue was proper. The defendant had not met the threshold burden of making the required "substantial preliminary showing" that the police were

lying about the existence of an informant. The defendant's major preliminary showing was that the affidavit had the informant providing information about criminal activity in geographically and ethnically distinct enclaves of the city -- a kind of access to information that the defendant speculated was highly unlikely. Moreover, the defendant attempted to rely on the large number of other police affidavits that relied on the same informant. But the defendant lacked particular discrete evidence of falsehood.

9. In Commonwealth v. Beldotti, 409 Mass. 553 (1991), the police conducted a warrantless search of the defendant's home, after the defendant called to report a dead body in his bathroom. The SJC upheld the warrantless search, since the defendant's request for the police to come to his house and the defendant's subsequent behavior when the police arrived constituted a consent to the search.

A second issue in the case involved police seizure of a photograph found in the defendant's apartment of a nude woman. The police came upon the photograph in a closet when they returned to the defendant's apartment with a search warrant whose scope extended to evidence of blood, but which said nothing about photographs. Nonetheless, the police acted lawfully in seizing the photo, both because it was in plain view while they were executing the warrant and also because the photograph was an item the police could reasonably have tested for blood.

10. In Commonwealth v. Lyons, 409 Mass. 16 (1990), the defendant's automobile was stopped by the police based upon a tip received from an anonymous telephone caller. The Court concluded that the stop was unlawful and therefore all evidence seized as a result of the stop had to be suppressed from evidence. The reason that the stop did not pass legal muster was that the call gave the police no information regarding either the basis of the caller's knowledge or the caller's reliability. The Court noted that independent police corroboration may often make up for such deficiencies. However, no such corroboration took place in this case prior to the stop of the automobile.

11. In Commonwealth v. Price, 408 Mass. 668 (1990), the issue was whether the defendant had standing to challenge the admissibility of a surveillance videotape with sound. An undercover trooper negotiated with three men a large sale of marijuana, which was to take place in a motel room. The police then rented two adjoining motel rooms, installing a hidden camera and microphone in one and monitoring and recording equipment in the other. The police also obtained a search warrant allowing seizure of any conversations in the first motel room between the trooper and one of the negotiators and anyone

accompanying him in connection with the marijuana deal. In his supporting affidavit, the trooper gave his consent to the interception. The defendant was thereupon recorded when he participated in the marijuana transaction in the motel room.

The Court applied the usual search and seizure tests, under state and federal constitutional guarantees. It held that even if the defendant had a subjective expectation of privacy in the room, society would not be willing to recognize that subjective expectation as objectively reasonable. There could be no such reasonable expectation of privacy, the Court concluded, where the defendant was negotiating a major business deal with people he had just met and whom his associates had first met only the day before, in a motel room registered in the name of someone about whom the defendant knew almost nothing. In short, the defendant was negotiating with a stranger in a place selected by the stranger. Thus, the defendant had no protected privacy rights and no legal standing to object to the admissibility of the recorded conversations.

12. In Commonwealth v. Osorno, 30 Mass. App. Ct. 327 (1991), the defendant argued that the police failed to comply with the "knock and announce rule" before executing a search warrant for drugs in the defendant's apartment. The knock and announce rule requires a police officer, apart from narrow exceptions, to "knock, identify himself as a police officer, and state his purpose." In this case, the Appeals Court found it unnecessary to determine whether the officers complied with the rule (the door was opened for them in response to a buzzer and the officer standing in the open doorway made a partial announcement as but not before he entered the room, identifying himself but not stating the purpose of the visit) because in any event as soon as the door was opened, the officer as he was announcing himself observed the defendant clutching a white plastic bag run out of the room. The officer was lawfully entitled to immediately enter and pursue the defendant into the bathroom to prevent evidence from being destroyed.

13. In Commonwealth v. Fernandes, 30 Mass. App. Ct. 335 (1991), a drug search warrant was challenged on three bases: 1) general statements in the affidavit such as, "any other illegally controlled drugs..."; 2) the reliability of confidential informants; and 3) staleness of the information. The Appeals Court rejected all three challenges. The impermissibly general statements were cured by other statements in the affidavit that particularly described the items to be seized. The informant's reliability was established by describing the role the informant played in the prior arrests of named individuals and by police corroboration of certain details. Finally, the fact that the affidavit described a protracted drug distribution scenario made staleness of information less of a problem.

14. In Commonwealth v. Santiago, 30 Mass. App. Ct. 207 (1991), the issues were whether a police officer acted reasonably in approaching an automobile stopped for traffic violations, was justified in conducting a limited search for weapons on one defendant's body and properly searched the vehicle's trunk and seized contraband located in it. The Court held that the police officer, who had been ordered to the location of a Malden motel to observe a particular room in connection with a narcotics investigation and there observed suspicious activity followed by three people's exit from the room and departure in a vehicle at high speed and in an erratic fashion, acted reasonably in making a traffic violation stop. The actions of two of the three people in the car of jumping abruptly from it when it stopped and of the third in ducking behind the car, justified the officer's limited search for weapons on the person of the passenger who had ducked behind the car. Finally, there was no constitutional violation in the search of the trunk, when one of the passengers stated that he wanted to retrieve a personal possession from the trunk and the operator and purported owner consented.

15. In Commonwealth v. Mejia, 29 Mass App. Ct. 665 (1991), the Appeals Court held that an affidavit in support of a search warrant which stated that a confidential informant had previously provided information leading to the arrest of three named individuals, but provided no additional information to support the informant's veracity, was insufficient to establish the informant's veracity.

16. In Commonwealth v. Scott, 29 Mass. App. Ct. 1004 (1990), the issue before the court was whether the defendant's Fourth Amendment rights were violated when a warrantless search of his motor vehicle was conducted. The Appeals Court held that the warrantless search was justified by the fact that the police had knowledge that the defendant was fleeing from the scene of a crime and hence there was no time to apply for a warrant.

II. Admissions/Confessions

1. In Commonwealth v. Colon-Cruz, 408 Mass. 533 (1990), the defendant was convicted of murdering a state trooper. The defendant argued that his statement to the police should be suppressed on the grounds that 1) his medical condition rendered him incapable of making a proper waiver of his Miranda rights and 2) the translation of the Miranda warnings into Spanish was not fully accurate. The trial judge admitted the statement and the SJC found no error. The defendant's injuries were minor and in no way undermined his ability to make a knowing waiver of rights. As to the translation, the testimony showed that the police translator read an English language Miranda card to the defendant and then translated the card into Spanish. The

officer then showed the card to the defendant and asked him to sign the card if he understood the warnings. The defendant signed the card.

2. In Commonwealth v. Ewing, 30 Mass. App. Ct. 285 (1991), the defendant was properly given his Miranda warnings. He chose to waive his right to remain silent and proceeded to confess to stabbing the victim with a knife. On appeal, the defendant argues that his refusal during the course of the interrogation to answer one particular question should have been taken as an indication that he was revoking his waiver and wished to remain silent. The SJC rejected this argument, noting that there was nothing in his refusal to answer the one question (about homosexual activity with the victim) that indicated in any way that the defendant wished the interrogation to cease.

3. In Commonwealth v. Chandler, 29 Mass. App. Ct. 571 (1990), the defendant confessed to committing a murder. He was found not guilty of the murder by reason of insanity, but was convicted of unlawfully carrying a firearm. The only evidence to support the firearm conviction was the confession. The defendant argued that his statements were not based on a knowing and intelligent waiver of his Miranda rights, but were coerced by threats of his brother being prosecuted and by promises of leniency in his case. The Court rejected this argument, finding that the defendant had never invoked his right to remain silent, had never attempted to end the police interrogation, had innate intelligence, and that his mother, not the police, prompted the confession.

4. In Commonwealth v. Ayala, 29 Mass. App. Ct. 592 (1990), a state police officer was called upon to assist MDC officers by advising a suspect of his Miranda rights in Spanish. The trooper testified that he gave the warnings by memory and advised the defendant that if he wished to make a statement, he could do so. However, the trooper failed to warn the defendant that any statement he did make could be used against him. The defendant did make an incriminating statement. The court held that the omission of this part of the Miranda recital rendered the defendant's statement involuntary as a matter of law and hence inadmissible into evidence against him.

III. Identification

1. In Commonwealth v. Scott, 408 Mass. 811 (1990), the defendant was convicted of murder in the first degree. An eyewitness identified the defendant from several photo arrays. The procedure was that the Marlborough police showed the witness four different photo arrays over a period of several days. The witness picked out two photos from this group, one of which was the defendant's. The defendant's photo was overexposed. A few days later, on the evening the defendant was arrested, the

witness identified him from another photo array, which included a new picture of the defendant taken that day. The Court ruled there was nothing unduly suggestive in these identification procedures.

2. In Commonwealth v. Smith, 29 Mass. App. Ct. 449 (1990), the defendant was convicted of armed robbery of a Burger King in Stoneham. Two employees independently identified the defendant from photo arrays. The defendant argued that error was committed at his trial when the judge permitted the photo arrays to be shown to the jury. But the Court ruled the exhibit was proper, since the photo arrays had been the major investigatory tool fixing suspicion on the defendant. In addition, the photo array was shown to the jury in a way that eliminated any sign of mug shots of the defendant (which mug shots would suggest to the jury that the defendant had a prior criminal record).

IV. Blood/DNA Tests

1. In Commonwealth v. Curnin, 409 Mass 218 (1991), the Supreme Judicial Court confronted for the first time the issue of admitting into evidence the results of tests comparing the DNA of a criminal defendant with DNA found at a crime scene. In this case, the results of the DNA "fingerprinting" tests were introduced to prove that semen found on the nightgown of a fourteen-year old rape victim was that of the defendant. The tests tended to show that only one white person in 59,000,000 had the same distinctive DNA components as were found in the DNA comparison test.

But the SJC found that the DNA tests used in this case did not enjoy any general acceptance in the scientific community or inherent rationality. Given this failure, the admission of the test results was prejudicial error requiring reversal of the defendant's conviction.

2. In Commonwealth v. Sims, 30 Mass. App. Ct. 25 (1991), a rape case, the defendant argued on appeal that his conviction should be reversed, since various tests on blood and semen found at the scene failed to identify the defendant as the donor. However, after reviewing the expert testimony, the SJC upheld the conviction, since the expert testimony at trial was not fully exculpatory but established only that the tests were not conclusive and that they could not rule in or out the defendant as the source of the blood or semen. Moreover, the SJC noted that, unlike paternity tests, blood and semen identification tests were generally not accorded conclusive status and instead were left to the jury to weigh in light of all the evidence.

V. Sexual Offenses

1. In Commonwealth v. Montanino, 409 Mass. 500 (1991), the investigating officer in a rape case was cross-examined about certain inconsistencies between the victim's trial testimony and the victim's initial account of the incident to the police. On redirect, the officer was asked whether he had an opinion as to whether victims get more specific in their description of incidents as the case proceeds. The officer was permitted by the Court to testify that in his experience, victims of sexual assault provided him in successive interviews with new and further details of the incident from those described in the initial interview. The SJC reversed the defendant's conviction, finding that the police officer's "opinion" testimony violated the long-standing rule that witnesses (whether they are lay or expert) may not offer their opinions regarding the credibility of other witnesses.

2. Commonwealth v. Dion, 30 Mass. App. Ct. 406 (1991) dealt with an allegation that the defendant engaged in a single instance of sexual misconduct with a 13 year old mentally retarded boy. The incident was discovered and reported to police when the victim made a comment about the incident to his brother some 18 months after the incident was alleged to have occurred. At trial over defense objections, the brother was permitted to testify to his discussion about the incident, as evidence of a "fresh complaint" by the victim.

In its decision, the Appeals Court looked at the time lag between an incident of sexual abuse and a "fresh complaint" as permitted in prior cases. The court found that in almost all instances, the fresh complaint is made very shortly after the alleged incident. Exceptions have been recognized for small children and for cases where there is evidence of threats or intimidation. Applying the precedents to the case before it, the Appeals Court concluded that the victim's statement to his brother some 18 months after the incident could not be considered a "fresh complaint." The Court emphasized the absence of any threats or intimidation or assertion of a generalized fear on the victim's part. Since it was error to permit the brother to testify about his conversation with the victim, the Court reversed the judgment of guilty and ordered a new trial.

3. In Commonwealth v. Foskette, 30 Mass. App. Ct. 384 (1991), the Appeals Court held that the crime of rape of a child (G.L. c. 265, sec. 23) is not a lesser included offense of aggravated rape (G.L. c. 265, sec. 22[a]). Hence a defendant can be charged and convicted for both crimes. However, indecent assault and battery (G.L. c. 265, sec. 13H) is a lesser offense included in aggravated rape and, therefore, a defendant cannot be convicted for both. This is so except where there is an act,

distinct from the rape, that in itself qualifies as an indecent assault (e.g., pinching of the victim's breasts before penetration).

VI. Motor Vehicle Offenses

1. In Commonwealth v. Russo, 30 Mass. App. Ct. 923 (1991), the defendant collided virtually head-on with another vehicle while under the influence of alcohol and driving in the wrong lane. The defendant had to be removed from the wreck with "jaws of life" equipment and taken to a hospital. G.L. c.90C, sec. 2 requires police officers to draw up a citation of the motor vehicle offense being charged "as soon as possible after such violation and mail or deliver it to the defendant." Here the scene following the crash was sufficiently chaotic to excuse immediate delivery of the citation and the police delivered it about one hour after the accident by visiting the defendant in the hospital emergency room and leaving a copy of the citation with the defendant on his hospital gurney. The defendant seemed mentally aware and alert to the officers.

The defendant also challenged the admissibility of blood alcohol tests at trial, claiming that the extraction of blood from him without his consent was an unreasonable search. However, the Court found as a matter of fact that the blood tests were performed at the hospital's own initiative and were not requested or directed by the police.

The Court also upheld the admission into evidence of those parts of the hospital records that disclosed the defendant's high blood alcohol level. The Court rejected the defendant's argument that there needed to be a showing that the blood tests were related to a specific treatment or diagnostic procedure. Instead, it was sufficient to show that the blood tests were a standard procedure at the hospital for the kind of medical problem involved in the case. Two physicians testified that blood tests were a standard part of the "work-up" for treating injuries such as those the defendant received in the auto wreck.

2. In Commonwealth v. Murphy, 409 Mass. 665 (1991), the issue was whether a complaint charging operating a motor vehicle after suspension under G.L. c. 90, sec. 23 should be dismissed because the complaint did not allege that the defendant operated the motor vehicle "on a public way." The defendant, whose license had been revoked by the Registry for operating under the influence of liquor, was observed driving in the parking lot of a store closed at the time. He was arrested. The SJC held in this case that Section 23 does not require that a violation occur on a public way and that it clearly prohibits operation of a motor vehicle anywhere in the Commonwealth by a person whose license has been revoked or suspended.

VII. Gambling

In Commonwealth v. Club Caravan, 30 Mass. App. Ct. 561 (1991), the Appeals Court confronted the issue of whether video poker machines are gaming devices. The Court ruled that, since the games involve an element of skill, they qualify for licensing under G.L. c. 140, sec. 177A(1) and (2) as automatic amusement devices. Therefore, no indictments for gaming offenses will lie from simply having such machines on a premises for patrons to use. However, the Court went on to draw the line and to uphold the indictment of the defendant for various gaming offenses, in those situations where the evidence showed actual use of the video poker machines for gambling, i.e., paying off a customer in money rather than free games. In addition, on the facts of this case, the Appeals Court reinstated gaming indictments against the video poker machine servicing company, since the evidence presented to the grand jury permitted an inference that the servicing company was reimbursing bars that were making (illegal) cash payoffs to customers using the poker machines.

VIII. Miscellaneous

1. In In the Matter of a John Doe Grand Jury Investigation, 408 Mass. 480 (1991), the ongoing investigation into the Charles Stuart affair led to the following legal struggle. As part of its grand jury investigation into the celebrated murder case, the Suffolk District Attorney sought to compel Stuart's attorney to disclose to the grand jury the substance of a conversation the attorney had with Stuart the day before Stuart apparently committed suicide. But the Supreme Judicial Court ruled that there were no grounds for overriding the normal attorney-client privilege in this situation. The Court noted that Stuart's death did not terminate the attorney-client privilege, and the Court specifically rejected the District Attorney's argument that Stuart could no longer be harmed by any disclosures and therefore society's interest in determining the truth of what happened "overrode" the privilege.

2. In Commonwealth v. Kerr, 409 Mass. 11 (1990), the defendant, a police officer, was convicted of interfering with the quiet enjoyment of a tenant under G.L. c. 186, sec. 14. Under threat of departmental discipline, the defendant was required to answer questions in an internal investigation of the matter, after having been granted use immunity (a form of immunity that essentially guarantees the defendant that the state will not use any evidence or leads gained from the defendant's testimony in any subsequent prosecution). The defendant argued, however, that he was entitled to transactional immunity, a more robust form of immunity in which the defendant could not be prosecuted for crimes growing out of the same transaction about which he gave immunized testimony. The

Supreme Judicial Court, applying principles enunciated in Carney v. Springfield, 403 Mass. 604 (1988), agreed that the defendant's state constitutional rights under art. 12 of the Mass. Declaration of Rights were violated. However, the Court still refused to dismiss the charges against the defendant, since that would be "too high a price for society" to pay in a case where the defendant's statements in the internal police inquiry were not used at trial and where the questioning occurred prior to the Carney decision.

3. In City Wide Associates v. Penfield, 409 Mass 140 (1991), an eviction proceeding was brought against a tenant suffering serious mental disabilities, on the grounds that the tenant had violated the lease by banging on walls and causing damage. However, the damage was superficial and the SJC ruled that eviction of the tenant in these circumstances would violate the landlord's statutory obligation under existing law to "reasonably accommodate" the tenant's mental illness.

4. In Commonwealth v. Harris, 409 Mass 461 (1991), the Supreme Judicial Court reversed the defendant's second degree murder conviction, after finding that the defendant's right to an impartial jury was violated when the prosecutor used one of his peremptory challenges to exclude the sole black person in the venire from which the jury was drawn. As part of its guidance for a new trial, the SJC went on to consider the potential for prejudice to the defendant which results when a victim witness advocate sits in a courtroom and in front of the jury engages in visible displays of consolation, support, or sympathy(such as crying, handholding, and hugging) for the relatives of the murder victim. The SJC specifically declared that such visible displays should not be permitted, since the victim witness advocate is an agent of the state and is enhancing the credibility of the victim's family members and therefore also enhancing the credibility of any testimony these family members might give as witnesses.

5. In Commonwealth v. Mr. M., 409 Mass 538 (1991), the defendant was convicted of drug trafficking and sentenced to prison time. On appeal, the defendant challenged his prison sentence, on the grounds that the arresting officer had promised to recommend a "no incarceration" sentence if the defendant would cooperate with the police and work undercover in targeting other drug dealers. The defendant did cooperate and was successful in helping the police obtain arrests against further persons. Nonetheless, the district attorney's office had a policy of always recommending prison time in serious drug offenses and so refused to act upon the officer's promise.

On appeal the SJC vacated the sentence and remanded the case for a hearing on whether basic elements of fairness required that the police officer's promise to the defendant be

honored. The Court indicated that "if representatives of the district attorney's office permitted the defendant reasonably to believe that his successful cooperation . . . would lead to a sentencing recommendation of "street time" only, and if the defendant, reasonably relying on that apparent opportunity in order to aid his sentencing prospects, engaged in dangerous undercover work. . ., fairness obliges the Commonwealth to make the sought-after sentencing recommendation."

6. In Commonwealth v. Day, 409 Mass 719 (1991), the SJC disapproved of the admission into evidence, in the defendant's trial on manslaughter charges stemming from the death of an eighteen month old child, of a "child-battering profile" that the defendant was said to fit. The Court noted that the "use of criminal profiles as substantive evidence of guilt is inherently prejudicial to the defendant." And it described the use of a child-battering profile in this case as "highly prejudicial since it invites a jury to conclude that because an expert experienced in child abuse identifies an accused as someone fitting a particular profile, it is more likely than not that this individual committed the crime."

7. In Commonwealth v. Stockhammer, 409 Mass. 867 (1991), the SJC overturned the defendant's conviction for rape. At trial, the judge had restricted the defendant's ability to cross examine the victim as to her sexual activity -- a cross examination that the defendant said was relevant to the issue of whether the victim had a motive to lie about being raped. The defendant's theory was that the victim fabricated the rape story, because she did not want her parents to learn about her sexual activity. The SJC agreed that, nothwithstanding the rape shield laws, the defendant had a right to cross-examine the victim as to her sexual activity with him and her boyfriend, in an effort to expose any bias or motive to lie the victim might have had.

The SJC went on to make clear that, at any retrial, the defendant would also have a right to examine the records of a New York hospital where the victim had sought counseling treatment some 10 months after the rape. The Court found that the records were not privileged and that the defendant was entitled to review the records to search for evidence of bias, prejudice, or motive to lie.

8. In Commonwealth v. Resendes, 30 Mass. App. Ct. 430 (1991), the Appeals Court reversed the defendant's convictions for assault and battery on a police officer. Despite the fact that the incident was witnessed by the defendant's sister, the defendant did not call his sister as a witness and the prosecutor argued in closing that the jury should draw the conclusion that the sister was not called because her testimony would have been adverse to the defendant. The trial judge also

gave a "missing witness" instruction to the jury, detailing the circumstances in which they could draw an inference adverse to the defendant from the absence of his sister as a defense witness. The Appeals Court ruled that the facts of the case showed that there was not a sufficient foundation for giving this instruction in this case or for permitting the prosecutor to argue as he did in closing. Instead, the evidence indicated that there was considerable hostility between the sister and the defendant's fiancee, and thus other reasons she might not have been a defense witness.

Assistance and Contacts

The office is divided into four Bureaus: Criminal, Public Protection, Government, and Family and Community Crimes. The main office number for all extensions listed below is (617) 727-2200. The office address is: Office of the Attorney General, 1 Ashburton Place, Boston, MA 02108.

The listing below will provide you with the names of the Bureau Chiefs, and all Division Chiefs within the Criminal Bureau.

Office of the Attorney General

	Ext.
Scott Harshbarger, Attorney General	2042
John T. Montgomery, First Assistant	2057

Criminal Bureau

Edward Rapacki, Bureau Chief	2810
Paula DeGiacomo, Chief, Appellate Division	2826
Martin Healey, Chief, Narcotics Division	2517
Patricia Bernstein, Chief, Public Integrity Division	2856
David Burns, Chief, Special Investigations Division	2589
Martin Levin, Chief, Environmental Strike Force	2858
Maurice Cunningham, Chief, Asset Forfeiture Unit	2510
Michael Kogut, Chief, Medicaid Fraud Control Unit	3814
James Bryant, Chief, Insurance Fraud Unit	2827
Brian Burke, Chief, Division of Employment & Training	727-6824

Law Enforcement Newsletter

FROM THE OFFICE OF THE
Attorney General
For The Commonwealth of Massachusetts

Scott Harshbarger
Attorney General

Contact:(617)727-2200

Vol. I, No. 2 October 1991

TABLE OF CONTENTS

LAW ENFORCEMENT
NEWSLETTER

Letter from the Attorney General:

Corrections and Sentencing Reform Are Essential to Swift, Fair and Equal Justice in the Commonwealth

October, 1991

To Members of the Law Enforcement and Criminal Justice Community:

The draconian budget cuts of the past two years have seriously hindered our ability to protect the public and to deliver swift, firm, fair and equal justice. In spite of this fact, thousands of dedicated police officers, prosecutors, judges, clerks, probation and correctional officials, victim witness advocates and others have continued to perform their difficult and generally thankless roles with distinction and honor.

Despite these heroic efforts, the criminal justice system not only is in crisis, it has virtually collapsed. More importantly, the public has totally lost confidence in our ability to do the job effectively. Unfortunately, the public is being led to believe that quick-fix solutions -- increasing sentences, putting even more people in already overcrowded jails for longer periods of time, trying more juveniles as adults and reinstating the death penalty -- will combat crime and violence effectively at no additional cost. They are also being led to believe that we can do this at the same time we reduce funding for virtually every major program designed to address the underlying causes of violence, and fail to restore funding for our law enforcement and criminal justice efforts.

Needless to say, adequate funding is not the only issue which needs to be addressed; nor are allegedly magic panaceas the only remedies to be avoided. The reality is that our criminal justice system is not -- and perhaps never was -- a system at all. Rather, it is a complicated patchwork of interrelated parts, sometimes held together by band-aids and thread, and by the good will and hard work of countless people who care deeply about what they do. In good times, it is sometimes possible for the parts to mesh; but, in bad times, band-aids, thread, good will and hard work are not enough.

The crisis we face offers a unique opportunity to begin to address together the fundamental reality that our system is really a non-system, and that major structural reforms are needed as the first and most basic step in enabling us to administer swift, fair and equal justice and in restoring the confidence of the public.

In February, 1991, the Boston Bar Association and Crime and Justice Foundation's Task Force on Justice issued a report entitled, "The Crisis in Corrections and Sentencing in Massachusetts." The Task Force made the following troubling findings, which came as no surprise to those of us in the system, but were nonetheless important to document and articulate:

* The Commonwealth's criminal justice system is currently unable to hold offenders accountable for their crimes, or to provide adequate resources so that criminal sanctions could be uniformly and fairly applied, and engender public confidence.

* The courts are so grossly clogged that they are unable to impose timely sanctions; the probation system is so understaffed that it is unable to provide adequate supervision to those on probation; and the prison system is so dangerously overcrowded that draconian steps must be taken to reduce the prison population.

* Our system of criminal sanctions goes from the extreme of giving judges complete discretion to impose penalties within a broad framework, to the other extreme of totally eliminating discretion through the vehicle of mandatory sentences -- and it is nearly incomprehensible to individuals outside of the system.

In February, I challenged the Boston Bar Association to translate its findings and recommendations into a legislative proposal. In September, they met that challenge when legislation, drafted by their Special Committee on Sentencing Legislation, was filed with the bipartisan support of a coalition of state legislators.

The major components of the proposed legislation are:

* <u>Centralization of the Criminal Justice System</u>

The legislation would expand the duties of the Executive Office of Public Safety into a new Executive Office of Criminal Justice and Public Safety, an office that would establish and coordinate corrections and sentencing policies of the Commonwealth. The functions of probation and parole would be combined under a new Department of Correctional Institutions, and a nine-member Community Safety Board would administer the discretionary placement of offenders under community supervision.

It simply does not make sense for the various agencies responsible for the supervision of persons convicted of crimes to be housed in different branches of government, as is presently the case. Rather, they should be under one "umbrella" office so there may be overall direction and purpose in the development and implementation of criminal justice policies and programs. The proposed legislation would accomplish this goal.

* Sentencing Reform

The legislation would create a Sentencing Commission, a body that would establish sentencing guidelines, subject to review and annual amendment, if appropriate. The charge of the Sentencing Commission would be to promulgate consistent, fair and certain penalties by eliminating disparities in sentences for comparable offenders and offenses.

"Good time" credits, which can reduce a sentence by up to 40 percent, would be abolished. Only prisoners who have served two-thirds of their sentences would be eligible for supervised release. And, recognizing that most prisoners are released at some point, every offender would be subject to a period of post-release community supervision.

A new sentencing structure, devised and implemented by the Sentencing Commission, which would result in "truth in sentencing," is fundamental to the restoration of credibility of the criminal justice system in the eyes of the public. The proposed legislation would accomplish this, and would do it in a way that ensures tough, certain and understandable sanctions.

* Intermediate Sentences

The proposed bill would establish a range of intermediate punishments short of incarceration. This recognizes the fact that jail space is and always will be limited, and that there are many offenders for whom jail is not the answer, but for whom some form of meaningful punishment is necessary and appropriate.

The reality is that we will never be able to build our way out of the prison overcrowding problem. Intermediate sentences, such as restitution, intensive probation, electronic monitoring, youthful offender programs or "boot" camps, and community work programs have demonstrated their utility, effectiveness and efficiency, without sacrificing public protection and public safety. We must institutionalize this range of sanctions and integrate them into a coherent sentencing strategy. The proposed legislation would accomplish this goal, too.

The proposed legislation is not a panacea or a fail-safe solution to all the problems we face in the criminal justice system. It does, however, represent a starting point for substantive debate about what changes should be made in the sentencing and corrections structure in this state. The specifics and the details can be worked out, but at least now we have a framework within which to work. The broad objectives are now in place.

In my letter to you in our June, 1991 Law Enforcement Newsletter, I outlined my support for court reform legislation to provide the basis for centralization and accountability in the court system. Meaningful court reform, coupled with sentencing and corrections reform, would have a genuine and lasting positive impact on the court and criminal justice system. If we do not take advantage of the present climate for change, driven in part by the fiscal crisis and the desire for fiscal responsibility and efficiency, we may lose the opportunity for years to come.

I urge all of you in the law enforcement and criminal justice community to join the growing constituency which is actively supporting sentencing and corrections reform legislation (and court reform legislation) during this legislative session. All of us have worked too hard for far too long to let the system slip further into chaos and to allow further erosion of public confidence in government's ability to provide public protection.

I look forward to hearing from you on the proposed sentencing and corrections legislation, and working with you on all of these crucial issues. Together, we can succeed in protecting the public, while administering swift, fair and equal justice.

Sincerely,

Scott Harshbarger

P.S. I mentioned in the first Law Enforcement Newsletter that I hoped for the participation, contributions, ideas and suggestions by others in future editions. I am pleased and honored to welcome the contribution of several of the District Attorneys and their staffs in this edition. This Newsletter is now truly a joint production. With your continued input, the Newsletter will improve with each edition, offering substantive information for members of the law enforcement and criminal justice community. Thank you.

RECOGNIZING HAZARDOUS SUBSTANCE SCENES

By: Martin E. Levin, Assistant Attorney General
Chief, Environmental Strike Force

SCOPE

The purpose of this article is to provide guidance to the law enforcement community regarding the recognition of hazardous materials and hazardous wastes. Law enforcement officers will not usually have technical tools immediately available to them to determine whether a substance is actually hazardous. Such officers must therefore rely on their physical and common sense perceptions to initially appraise what may be a threat to the public health and safety as well as a violation of environmental laws.

CAUTION

This article is by no means a comprehensive explanation of the physical and chemical nature of hazardous substances and the risk of harm such substances may pose. **THE LAW ENFORCEMENT OFFICER SHOULD APPROACH ALL SUBSTANCES WHICH HE OR SHE BELIEVES MAY BE HAZARDOUS WITH THE UTMOST CAUTION.**

* MAINTAIN RADIO OR VISUAL CONTACT WITH ANOTHER OFFICER DURING THE INVESTIGATION OF ANY POTENTIAL HAZARDOUS SUBSTANCE SCENE.

* STAY UPWIND AND UPHILL OF A SPILL. If possible, view the scene with binoculars before approaching.

* MAINTAIN A SAFE DISTANCE FROM THE SCENE IF YOU SENSE ITCHING, BURNING, OR OTHER IRRITATION OF THE EYES, NOSE, MOUTH, OR SKIN. Consult a physician as soon as possible.

* DO NOT ENTER CONFINED AREAS CONTAINING HAZARDOUS SUBSTANCES.

* DO NOT INHALE DIRECTLY FROM THE SOURCE OF THE SUBSTANCE.

* DO NOT MAKE PHYSICAL CONTACT WITH A HAZARDOUS SUBSTANCE. Besides the obvious risk of direct physical exposure, an officer should avoid getting suspect substances on his shoes or clothing. Such substances may be inadvertently carried back to the officer's home or workplace, exposing others.

* DO NOT EAT OR DRINK AT A HAZARDOUS SUBSTANCE SCENE. Avoid any conduct which might result in ingestion of the hazardous substance.

* DO NOT EXPOSE THE SUBSTANCE TO FIRE, HEAT, OR WATER. Cigarettes, road flares, matches, and even automobiles can be the source of sufficient fire or heat to cause the substance to ignite. When exposed to water, many substances release a toxic gas.

* DO NOT OPEN CONTAINERS. Exposing sealed substances to the air can release dangerous fumes or cause an explosion.

* CONTACT YOUR LOCAL DEPARTMENT OF ENVIRONMENTAL PROTECTION, FIRE, AND HEALTH OFFICIALS IMMEDIATELY.

HAZARDOUS SUBSTANCE INDICATORS

In determining whether he or she is confronted with a hazardous substance scene, the law enforcement officer should ask three questions: 1) What is the substance? 2) Where is the substance found? 3) How is the substance being handled? The answers to these questions will generally be good indicators of whether the substance is hazardous.

WHAT IS A HAZARDOUS SUBSTANCE?

Generally, a substance is hazardous because it has one or more of the following four qualities:

* FLAMMABLE/IGNITABLE: the substance easily causes fire.
* CORROSIVE: the substance causes burns or other physical degradation.
* REACTIVE/EXPLOSIVE: the substance causes explosions or releases toxic fumes.
* TOXIC: the substance causes immediate acute health effects (e.g., nausea, vomiting), or serious long-term health effects (e.g., cancer, liver damage).

The following are frequently indicators of hazardous substances:

the substance causes itching, burning or irritation to the eyes, nose, mouth, or skin;
the substance causes dizziness or shortness of breath;
the substance has an unusual odor, such as a chemical or petroleum odor;
the substance causes discoloration or staining of soil and other surfaces;
the substance creates an oily sheen or rainbow in water;
the substance consists of, or emits, smoke or vapor;
the substance causes stressed vegetation or kills fish and game;

when contained, the substance causes hissing sounds (such as escaping gas) or pinging sounds (due to expansion or settling);
drums, or other closed containers, in which the substance is being held, exhibit bulging or corrosion from the inside.

WHERE ARE HAZARDOUS SUBSTANCES FOUND?

Hazardous substances are found everywhere in our communities, including our homes. However, those substances which are typically of concern to the law enforcement officer are those which are being put to industrial or commercial use. It is such substances which are of large enough quantity to create significant risks to public health and the environment, and significant costs of proper handling. Hence, a strong indicator of whether a substance is hazardous is if it is found in or near, or if there is evidence linking it to, one of the following common users of hazardous substances:

(1) Furniture makers or refinishers
(paints, acids, stripping and varnishing chemicals)
(2) Metal shops that do plating or stamping work
(plating chemicals, metal cleansers)
(3) Automotive shops that do repairs and/or body work
(paints, waste oil, metal cleansers)
(4) Gas stations
(waste oil, gas, metal cleansers)
(5) Research laboratories
(chemicals, infectious and radioactive materials)
(6) Photo shops
(photo developing chemicals and wastes)
(7) Funeral homes
(embalming chemicals)
(8) Commercial cleaning companies
(cleaning chemicals)
(9) Dry cleaners
(dry cleaning chemicals)
(10) Pesticide dealers
(insect, weed and fungus killing chemicals)
(11) Medical facilities
(infectious and radioactive materials; wastes in vials, syringes, and "red bags")
(12) Large and small manufacturers (e.g., "high tech" manufacturers; auto manufacturers; clothing manufacturers; paper manufacturers)
(manufacturing chemicals and chemical wastes, paints, dyes; wastes often discharged through pipes to ground or water)
(13) Chemical and pharmaceutical industries
(chemicals, chemical wastes, drugs)
(14) Petroleum/oil facilities
(gas, oil, cleaning chemicals)

HOW IS THE SUBSTANCE BEING HANDLED?

Whether being transported, stored, or disposed of, evidence of handling is a significant indicator of whether a substance is hazardous. Properly handled hazardous substances are stored in containers (e.g., drums, sealed plastic bags, tanks) which are labelled or otherwise marked with warnings of the contents and associated hazards. The containers are stored in such a way as to prevent possible leakage or breakage, minimize fire or explosion risk, and insure easy access for safe movement and control of the substance. Such substances are generally transported in placarded vehicles, and the haulers will have paperwork with them describing the substance, its point of origin, and its point of destination. (see attached illustration of Department of Transportation Hazardous Materials Warning Labels and Placards) Proper on-site disposal, whether by emission to air or discharge to water, will be in such a fashion as to prevent spills and immediate human exposure, will frequently involve some form of treatment before being released into the environment, will be monitored, and will be permitted by the regulating government agency. Off-site disposal will be in a licensed or permitted disposal facility.

Indicators of improper, and potentially criminal, handling of hazardous substances are:

(1) Dumping into floor drains, sinks, and toilets
(2) Discharge into underground storage tanks
(3) Disposal into storm drains and manholes
(4) Direct disposal onto the ground or into pits
(5) Disturbed soil, excavation, or other signs of burial
(6) Abandonment of containers on vacant properties and in rural areas
(7) Abandoned box trailers or other vehicles with drums or bags inside them
(8) Drums, bags, and other unmarked or uncontained substances mixed with trash, construction debris, or commercial wastes
(9) Unmarked or mismarked drums or other containers
(10) Unmarked containers kept in large quantity, or over a long period of time, in a closed or otherwise hard to see area (i.e., improper storage)
(11) Discharges to surface water which contain solids, unusual color or sheen, or strong odor
(12) Off-road, rural, nighttime, or other surreptitious and unusual activities by truck
(13) Emissions to air of smoke or vapors containing unusual colors, chemical smells, and/or where direct human contact is likely

(14) Any of the suspicious discharges described above by use of hoses (e.g., hoses running from a tank to a floor drain; discharge of liquid from a truck to a storm drain by hose).

REMEMBER, YOU CANNOT BE EXPECTED TO KNOW THAT YOU ARE DEALING WITH A HAZARDOUS SUBSTANCE SCENE. HOWEVER, IF YOU NOTE ANY COMBINATION OF THE ABOVE INDICATORS, YOU HAVE REASON TO SUSPECT A HAZARDOUS SUBSTANCE IS INVOLVED. CONTACT THE APPROPRIATE AGENCIES LISTED BELOW FOR FOLLOW-UP. IF YOU SUSPECT LEGAL VIOLATIONS, CONTACT THE ENVIRONMENTAL STRIKE FORCE AT THE ATTORNEY GENERAL'S OFFICE (617/727-2200) OR THE DEPARTMENT OF ENVIRONMENTAL PROTECTION (617/556-1000).

EMERGENCY SPILL RESPONSE

Contact:
1) Local Fire Dept.
2) DEP Emergency Response/State Police (617) 566-4500

POLLUTION OF WETLANDS AND WATERWAYS

Contact:
1) Local Conservation Commission
2) Environmental Police (800) 632-8075

WORKPLACE TOXIC EXPOSURES (including lead and asbestos)

Contact:
Dept. of Labor & Industries (617) 727-1932 or 1933

HEALTH EFFECTS OF EXPOSURES

Contact:
First contact should be local Board of Health or Health Officer. If additional information is required:

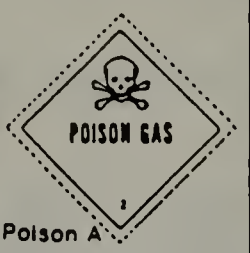
1) for chemical related health effects -
Dept. of Public Health, Div. of Environmental Health Assessment
(617) 727-7170

2) for infectious or medical waste health effects -
Dept. of Public Health, Div. of Communicable Diseases
(617) 522-3700, x. 420

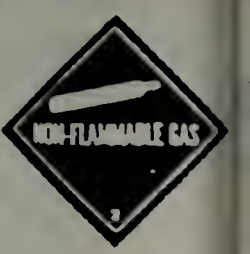
PESTICIDES

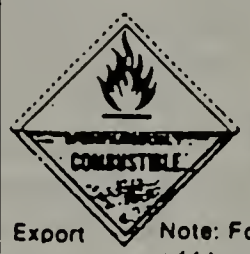
Contact:
Pesticide Bureau (617) 727-3020

DOT Hazardous Materials Warning Labels



Poison A





Export

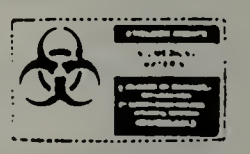
Note: For use in addition to other required labels.

Poison B

Export

Domestic

Export



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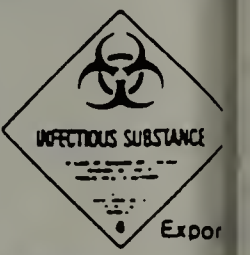
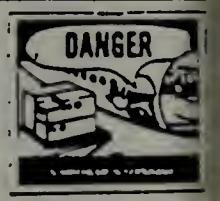


Expor

AIR TRANSPORT



Cargo Aircraft Only

DOT Hazardous Materials Warning Placards

1

2

3

4

5

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7

8

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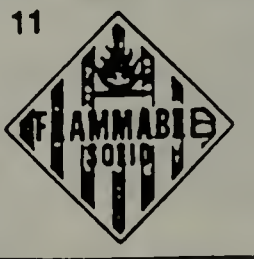
11



12

13

14

15

16

17

18

Use a square background on "large quantity" shipments requiring special routing

HIGHWAY TRANSPORT

Cargo and Portable Tanks

May be substituted for Flammable and/or Combustible placard. See Sec. 172.542 and 172.544

RAIL TRANSPORT

Use a square background for the above placards.

CHARITABLE FUNDRAISING: ISSUES AND PROCEDURES

By: Richard Allen, Assistant Attorney General,
Chief, Division of Public Charities, and
Elissa Boisvert, Paralegal

This guide is designed to assist police officials in understanding the laws governing charitable solicitation, as well as the role of the Attorney General's Office and of local police departments in enforcing these laws. Addressed are: i) solicitations by charitable organizations, and ii) solicitations by local police organizations.

Beginning with a brief overview of charitable fundraising, this guide consists of two parts. The first part discusses the Role of the Attorney General's Office, Charitable Giving, Law Enforcement Organizations, Professional Fundraisers, Victim Interviews, and Charitable Gaming. The second part discusses the role of police officials in the investigation and prosecution of professional fundraisers and fraudulent charitable organizations.

INTRODUCTION

While charitable giving generally benefits many worthy causes, it is especially important in times of fiscal limits when the government cannot meet the needs of all who require its assistance. Unfortunately, there are some members of society who take advantage of the generosity of the public by raising charitable funds under false pretenses. Additionally, during the past few years, the Supreme Court of the United States has limited the ability of states to regulate some aspects of fundraising by charitable organizations. These limits have led to an increase in the number of professional fundraisers who have turned charitable fundraising into an extremely profitable and lucrative business.

A) CHARITABLE SOLICITATION AND FRAUD

Role of the Attorney General

The Division of Public Charities at the Attorney General's Office is located at 1 Ashburton Place, Boston, Massachusetts 02108, phone number (617)727-2200. Responsible for enforcing laws pertaining to charitable organizations and their fundraising, this Division ensures that charitable organizations are accountable to the public by registering the charities, except religious organizations, with the Division and keeping on file their annual financial reports. These reports are public record, and can be viewed by the general public during regular business hours. The Division also registers professional fundraising companies. The professional fundraisers' files are public record and contain contracts

between charities and fundraisers, as well as financial reports pertaining to specific solicitation campaigns. The files may be viewed in the office of the Division, and copies of documents are provided to Police Departments upon request.

When allegations of fraudulent or deceptive charitable fundraising are reported, the Division conducts investigations and takes enforcement action against both the professional fundraiser and the soliciting organization if the circumstances warrant such action.

Organizations which are not charitable, but which use a charitable appeal to raise funds, are subject to the laws governing charitable solicitations and organizations.

Charitable Giving

The general public should be encouraged to contact the Division of Public Charities before making a decision about charitable giving. While registration by a charity or a fundraiser with the Division of Public Charities does not constitute endorsement or approval of that charity or fundraiser by the Office of the Attorney General, a potential donor will be able to learn if the charity is in fact registered as required by law, and will have the opportunity to review the charity's financial information. Furthermore, police officials can contact the Division to check on the registration status of charitable organizations that are soliciting in their communities. Inquiries from local law enforcement officials will assist our office in learning of possible problems or violations of the law as quickly as possible.

Aside from contacting the Division of Public Charities, donors should follow these guidelines:

1. inquire about the identity of the person soliciting the donation, i.e. is the person a volunteer or a paid fundraiser?
2. ask for the fundraising organization's name, address, and phone number, if the solicitor is a paid fundraiser;
3. determine what percentage of gross receipts the soliciting organization charges (fundraisers often charge as much as 90%);
4. ascertain the charitable organization's name, address, phone number, and purposes for which the donation is being solicited; if there are any doubts about the legitimacy of the organization, call the charity directly to verify information given by the caller;
5. obtain as much written material as possible about the organization;
6. resist being pressured into making a donation.

Law Enforcement Organizations

Law enforcement relief organizations are required to register as charitable organizations since they are inherently charitable. Law enforcement unions are not considered charitable organizations unless they solicit charitable funds. Solicitations which strictly benefit the union are not charitable. However, police unions soliciting donations strictly for union use must also be extremely cautious that their fundraisers are not being deceptive in any way. M.G.L. c. 93A prohibits deceptive and unfair practices during the conduct of any trade or commerce. Unfortunately, some fundraisers can be over zealous in their fundraising, and impersonate law enforcement officials, or employ explicit or implicit coercion in their fundraising techniques. These types of problems are considered deceptive and unfair practices of trade. For this reason, it is very important that union officials monitor the fundraising activity being done on their behalf, and take decisive actions to prevent or correct any such problems.

When a law enforcement union solicits funds and the appeal to the public slips into the charitable area, for example if the appeal either states directly or implies that donations will be used for a scholarship fund, drug rehabilitation programs, or other charitable works, the union must register as a public charity with the Division of Public Charities.

In a situation where charitable funds are being solicited by a union, the charitable funds should be kept in a separate account from the regular union money. Furthermore, only the charitable funds must be included in the annual financial reports submitted to the Division of Public Charities. The charitable funds must be used for the purposes stated in the original solicitation.

Professional Fundraisers

Many charitable organizations hire professional fundraisers to solicit funds on their behalf often through telephone calls. These fundraisers are for-profit and usually pay their telemarketers on commission. Since many professional fundraising organizations charge up to 90% of the gross revenue received through the solicitation, there is a huge potential for abuse. Under United States Supreme Court case law, the states cannot establish a mathematical limit (e.g. a percentage) on how much of each donation a fundraiser may keep, or similar limit on how much of the money may be used by the charity for fundraising or administrative expenses. On the other hand, the charity has a fiduciary duty to enter into only fundraising contracts that are reasonable, and the group must have a legitimate program and keep its administrative and fundraising costs within reasonable limits.

The most common violations of Massachusetts Law committed by fundraisers are: 1) failing to register, 2) soliciting charitable funds for an organization which is not registered, 3) using misleading and deceptive statements to encourage donations, 4) not disclosing professional fundraising status, 5) impersonating members of the charitable organization (this is especially true in the case of charitable solicitation being made on behalf of a law enforcement organization), and 6) in the case of solicitation on behalf of police, fire, or safety inspection groups, implicit or even explicit coercion.

Charitable organizations which hire professional fundraisers are also held accountable for the actions of the fundraisers they hire. Charities must monitor the activities of their fundraisers. If charities do not take decisive action to make fundraisers comply with Massachusetts Law, the Attorney General's Office will take action against the charities, as well as the fundraisers.

Victim Interviews

Once a donor has agreed to make a contribution, many professional fundraisers use couriers to pick up the check. (Please see second section of article by AAG John Ciardi of the Criminal Bureau for more information on couriers.)

Upon determining that a fundraising organization has attempted to solicit charitable funds by making deceptive statements or by otherwise misrepresenting itself, a detailed interview of the solicited donor should be conducted. Such interviews can be easily converted to affidavits by the Attorney General's Office, and will be the key evidence in a case against the fundraiser.

In order for the interview to be complete, police officers should be sure to ask the following questions:

1. Get the victim's name, address (home or business depending on where call was received), and telephone number.
2. Determine date call was received and whether made to victim's home or business.
3. How did the caller identify him/herself? For example, did caller give his or her name and address, the name and address of an organization, etc.?
4. Did the caller state or imply that he or she was calling from, or was a member of, a charitable organization?
5. At any time during the phone conversation, did the caller identify him/herself as a professional fundraiser or someone hired by a charity specifically to raise funds by telephone?

6. Did the caller ask for a straight donation to a charity or was the caller selling an advertisement, a product, a ticket, etc.? If the call involved the purchase of something, get details about the ad, product, ticket, etc.

7. Did the caller say what amount or percentage of the contribution or purchase would go to the charity?

8. What else was stated, implied, or suggested by the caller?

9. Did the victim make a contribution or purchase?

10. If the victim had known that the caller was not a member of a charitable organization, or was a professional fundraiser or that other things said by the caller were misleading or untrue, would he or she still have made the contribution or purchase?

11. Was the contribution or purchase made by cash, check, or otherwise? Was it mailed (to what address) or picked up by a courier(get a description)? Was anything left in return for the payment, such as a receipt, pamphlet, sticker, booklet, or product?

12. Did anything else happen, i.e. the victim received another call from the solicitor, the victim called the Attorney General's Office or the charitable organization, or the victim knows someone else who was called?

If it is not possible for the victim to be interviewed, the police official should take the donor's name and telephone number, and the names of the charitable organization and the professional solicitor along with a description of the suspicious activities. This information should be passed on to the Division of Public Charities.

Charitable Gaming

Raffles, Las Vegas Nights, and other gaming events are a common method of raising funds for charitable and non-profit organizations. Below is a brief list of requirements from the statute M.G.L. c. 271, §7A which governs such events:

1. The sponsoring organization must be non-profit (not limited to charities) and have been operating for at least two years.

2. Only qualified members of the sponsoring organization may promote and operate the event, and such members may not receive remuneration for time or effort devoted to the event.

3. The sponsoring organization must have a permit from the city or town clerk; this permit must be reviewed and approved by the Chief of Police.

4. The permit is valid for one year, during which time a limit of three Las Vegas nights can be held.

5. The city or town clerk has the authority to revoke the permit.

6. Within ten days of the event, the organization must submit a return to the Lottery Commission, and pay five percent of gross proceeds to the Lottery Commission.

7. Within thirty days of the event, the sponsoring organization must report to the city or town.

8. A police officer must be present during the event.

9. All funds which are raised through a gaming event must be used for the purposes as stated in the application for the permit, and must be educational, charitable, religious, fraternal or civic, or for veteran's benefits.

B) INVESTIGATION AND PROSECUTION

by John Ciardi, Assistant Attorney General, Criminal Bureau

The investigation and prosecution of telephone solicitation organizations can be complicated, not only because the key operators are insulated from contacts with police officers, but also because the investigating officer may not be familiar with this specific type of operation. Knowledge of the methods used by solicitation organizations, and the type of evidence that might be located, is essential to an effective investigation.

Generally, the solicitation calls are made from an office to businesses in a targeted area. The caller will usually identify him or herself as a police officer, fire department member, or local municipal official, or represent that he or she is calling on behalf of a police organization, charitable group, veteran's organization, local town government or school system. The caller will typically ask for a charitable contribution or attempt to sell space in an advertising journal the proceeds of which will be used for charitable programs. If the "victim" agrees to donate money, the caller will arrange to pick up a check, usually by courier. It is the courier who is most likely to be stopped and questioned by police officers.

The courier will usually be an employee of the solicitation organization, although some groups have used UPS couriers to pick up checks. In either case, the courier will have valuable information and evidence which will assist in the investigation. Careful questioning of the courier, and the recovery of physical evidence from the courier or the courier's vehicle, can provide enough evidence to support a search warrant for the organization's offices.

Couriers usually are sent out on a route with instructions to pick up checks from a number of businesses. Therefore, the courier will be carrying a number of documents, such as receipts, advertising folders, contracts, etc. The courier may also have some form of phony identification card in case the "victim" asks for it. However, couriers are often instructed on what to do and say if stopped by a police officer. The courier typically will claim that he or she just answered an ad in the

paper for a job and that he or she does not know anything about the business other than the instructions he or she received. Experience indicates that such disclaimers are not to be trusted.

The courier and the solicitation organization may have engaged in practices which are criminal, either as larcenies or attempted larcenies, or as deceptive solicitation practices under M.G.L. c. 68, section 28. Some of the groups investigated by the Office of the Attorney General have been entirely fraudulent, without any connection to real charitable organizations. Other groups have had contracts with charitable parent organizations but have engaged in deliberately deceptive and misleading solicitation practices within the scope of the prohibitions set forth in chapter 68. In either case the activity could be criminal, but the distinction is a difficult one which should be discussed with a representative of the Attorney General's Public Charities Division or Criminal Bureau.

If a police department receives calls from a local business reporting what appears to be a questionable telephone solicitation, the officer should call the Public Charities Division of the Office of the Attorney General. A legitimate charitable organization or paid fundraiser will be properly registered. A representative of the Public Charities Division will be able to quickly check the registration of the organization and the charitable group the money is supposedly being collected to benefit. If an organization is not registered that is a strong indication that investigation is warranted.

After checking with the Public Charities Division, an officer should attempt to intercept the courier as he or she arrives at a business to pick up a check. At that time the courier should be asked for complete information about his or her employer, the office address, the instructions given to the courier and the businesses to be visited. The courier should also be asked to turn over any and all documents related to scheduled pick ups, including advertising folders, receipts, stickers, lists of businesses, etc. If the courier does not have records on his or her person, the courier's consent should be obtained to search his or her vehicle for such items. (In view of the laws governing a voluntary consent to search, a written consent form should be used whenever possible.) If the investigating officer believes probable cause exists to arrest the courier for attempted larceny, then the vehicle may be searched as a search incident to arrest and/or as an inventory search where department policy requires such a search.

If the courier is a United Parcel Service courier, he or she will have C.O.D. Statements listing the company and the amount of money the company is supposed to pay. The UPS courier should be asked to produce any such C.O.D. Statements. The UPS

office can then provide information concerning similar packages, the originating shipper, customer information and other information which should identify the parties responsible for the solicitation call.

The items seized in such a search, or turned over by the UPS courier, will allow the officer to immediately contact the businesses listed on the seized advertising folders, C.O.D. Statements, or contracts to determine the circumstances under which the company agreed to make a donation. The officer should obtain as much specific information as possible about what was said during the solicitation call.

It is a violation of M.G.L. c. 68, section 28 for a caller to represent that he or she is a police officer, fire department official, or similar official if such is not the case. It is also a violation of the statute to claim to be calling on behalf of a charitable organization when no such representation has been authorized, or to use an official emblem, seal or badge of an organization when such use is not authorized. The "victim" who spoke to the caller may be able to provide information which will demonstrate that a violation of the statute has occurred. (Such as the fact that the caller claimed to be a police officer, or that the caller said the solicitation was authorized by the local police or fire department.) Receipts given to businesses, as well as items seized from a courier, may contain official looking emblems, seals or badges, or the name of a non-existent charitable group (such as "United Citizens Against Drunk Driving" or "Community Crime Prevention Council") which can help to establish the fraudulent nature of the solicitation campaign. Obviously, the same evidence may give rise to complaints for larceny or attempted larceny under M.G.L. c. 266, section 30.

If the investigation has produced evidence of activity which is criminal under general larceny laws or under c. 68, section 28, the next step in the investigation will usually be to prepare a search warrant affidavit for the solicitation organization's office. This step should involve consultation with the Criminal Bureau of the Office of the Attorney General. An Assistant Attorney General will assist in the preparation of the search warrant, can verify that a violation of the charitable solicitation statute has occurred and can discuss with police investigators the items that may be recovered during a search.

The solicitation organization's office can provide crucial documents to help direct the investigation. Telephone records and equipment can point to telephone toll charges which will show specific calls to "victims." Bank records may show where the money is being deposited. Payroll records and bookkeeping journals may lead to other employees and principals and may

show a link to other fraudulent solicitations. The office may also contain ad journals, lead cards and other documents which can be used to prove how the operation works. All of this evidence can establish a foundation for a grand jury investigation so that business records, bank records and telephone records can be subpoenaed to solidify the criminal prosecution.

CONCLUSION

The Office of the Attorney General will actively assist in all stages of the investigation and prosecution of these cases, by combining the resources of the Public Charities Division and the Criminal Bureau to make sure that information and support are provided promptly and effectively.

THE USE OF CONFIDENTIAL INFORMANT INFORMATION TO OBTAIN A SEARCH WARRANT

By: S. Jane Haggerty, Chief of Appeals,
Essex County

During the past few years there have been a fair number of opinions rendered by the appellate courts of the Commonwealth concerning the adequacy of search warrants which have been obtained in reliance upon confidential informant information. It is important to understand the practical effect of these decisions in order to properly prepare a search warrant. Because challenges in this area are limited only by the creativity of the drafters of the motions to suppress, and because the state constitution affords broader rights than does the federal constitution, it is always safer to err on the side of caution. For example, it is generally advisable to include as much detail as is possible concerning a confidential informant, provided that it can be done without compromising either the safety of the informant or the integrity of the investigation.

In the information which follows, the examples utilized relate to drug warrants because the bulk of search warrants are, in fact, warrants for drugs. It is important to remember, however, that in any search warrant the affidavit must contain information sufficient to establish probable cause to believe: 1) that the evidence sought is related to criminal activity (fruits, instrumentality, or evidence of a crime); and 2) that such evidence will be found in the place to be searched.

In order to rely on an informant's tip to establish probable cause, the state constitution requires that the tip meet the two-pronged test of probable cause stated in Commonwealth v. Upton, 394 Mass. 363 (1985) (the Aguillar-Spinelli test). That test requires that the affidavit set out: 1) the underlying circumstances from which the police conclude that the informant is credible or the information is reliable (veracity test); and 2) underlying circumstances which demonstrate the informant's basis of knowledge (basis of knowledge test).

VERACITY TEST

1. The appellate courts have held that an informant's track record of providing information concerning one prior arrest or even three prior arrests is insufficient without more to pass the veracity test. See Commonwealth v. Rojas, 403 Mass. 483 (1988) (one arrest insufficient); Commonwealth v. Mejia, 411 Mass. 108 (1991) (three arrests insufficient). However, the police typically have more information about the informant's past record of cooperation readily available which will sufficiently raise the level of veracity.

When dealing with a first-time informant, the veracity test may be satisfied if the informant gives very specific and detailed information (beyond information which is readily available to anyone) which is corroborated by the police. See Commonwealth v. Carrasco, 405 Mass. 316 (1989) and Commonwealth v. Gates, 31 Mass. App. Ct. 328 (1991). For example, a confidential informant describes in detail his purchases of cocaine from John Doe, who is being supplied with cocaine by Mary Roe and who is regularly selling drugs from his home at 85 Walnut Street. The police officer surveils 85 Walnut Street, observes the type of traffic and activity consistent with drug activity, observes known drug buyers and/or sellers at the location, on one occasion observes a car registered to Mary Roe parked at 85 Walnut Street, observes Doe and Roe together, and knows that Roe has a recent conviction for distribution of heroin. Inclusion of the details provided by the informant relative to his purchases of cocaine, coupled with details of the police investigation, will sufficiently bolster the informant's credibility that is otherwise lacking in a novice or first time informant.

2. If in fact the informant has previously given information leading to only a single search and/or arrest for drugs, it is essential that the affidavit state that drugs were actually seized at that search/arrest and that the location of the search was accurately described by the informant, as well as any other detailed information about the prior assistance which bolsters the reliability of the confidential informant. See Commonwealth v. Lapine, 410 Mass. 38 (1991). Likewise, if the arrest has resulted in a conviction, it is critical that the affidavit contain this information.

3. If the informant is actually known to the affiant or to other members of law enforcement community the affidavit should clearly state that fact. It is important to include any instances of past assistance and independent corroboration of that assistance even if the assistance did not lead to a search, arrest, prosecution, or conviction.

4. Although the value of the target's prior conviction(s) in demonstrating veracity has been limited by recent caselaw, the information concerning prior convictions should nonetheless be included. See Commonwealth v. Melendez, 407 Mass. 53 (1990).

5. Likewise, the informant's declarations against penal interest ("I bought drugs from John Doe two weeks ago; I injected the stuff and it was cocaine") should be included. In light of recent caselaw, such a statement has no value in demonstrating the veracity of the informant because, so the court reasons, the threat of prosecution is not real where the

drugs have been ingested. See Commonwealth v. Melendez. However, the statement is crucial to the "basis of knowledge prong."

If, on the other hand, the informant was arrested and found to be in possession of drugs and identified the target as his supplier, the informant's declaration bolsters both prongs of the test because prosecution of the informant is a real possibility. In either case the information should be included in the affidavit.

BASIS OF KNOWLEDGE TEST

1. This test is typically satisfied by the informant's stating that he or she has personally observed, purchased, or used drugs at a given location. Commonwealth v. Valdez, 402 Mass. 65 (1988). There may be a problem with observation of only a single instance of distribution if it is not recent and if there is no other information to believe that the conduct is ongoing. See Commonwealth v. Gates, 31 Mass. App. Ct. 328 (1991).

2. Hearsay information (the informant has heard that the target is selling drugs) is insufficient. However, sufficiently detailed admissions by the target made directly to or in the presence of the informant may be sufficient to satisfy the test even if the informant has not personally observed the contraband.

3. If the affiant is unable to state that the source of the informant's information is personal observation and contact with the target, very detailed information coupled with police corroboration may be sufficient to satisfy the basis of knowledge test. However, this is the least desirable option because there is no assurance that a judge will be in agreement at the subsequent motion to suppress. A good description of this approach is found in Commonwealth v. Cast, 407 Mass. 891 (1990).

4. A "controlled buy" may provide the necessary information to satisfy the basis of knowledge prong. Clearly, the more "controlled" the buy is (i.e. the more the police are able to control and observe), the more likely that the buy will satisfy the veracity test as well.

There is no question that the appellate courts of the Commonwealth have by their opinions placed additional burdens on law enforcement in the area of search warrants. However, in many cases the necessary information will be available and the legal requirements can be met with artful drafting of the affidavit.

RECENT CASES

I. SEARCH AND SEIZURE

A. Searches Pursuant To Warrant.

Search warrant for residence does not extend to search of car parked on public street. Commonwealth v. Santiago, 410 Mass. 737 (1991). The police obtained a search warrant to search the defendant and his apartment. While the police were executing the warrant at the apartment, the defendant drove up and parked a car on the street. The officers saw the defendant step out of the car and bend forward. One officer grabbed the defendant and took him into the apartment, while another officer searched the inside of the car and found cocaine.

The SJC held that the search of the car was illegal. The search was not justified as a search of the "curtilage" of the apartment building pursuant to the search warrant. While the SJC has upheld the search of an automobile parked on private property belonging to premises being searched pursuant to a search warrant even though the police lacked independent probable cause to search the automobile, Commonwealth v. Signorine, 404 Mass. 400 (1989), here the court held that, unlike private property, a public street is not within the curtilage of an apartment building, even where the building does not have off-street parking.

The court further held that the search was not justified as a search of the defendant's person pursuant to the warrant or as a search incident to an arrest, since the defendant relinquished possession and control of the automobile and its contents by the time of the search. Nor was the search justified under the "automobile exception" because at the time the search was conducted, the police did not have probable cause to believe that the car contained contraband, since nothing in the informant's information pertained to the defendant's automobile.

False statements in search warrant affidavits. Commonwealth v. Pignato, 31 Mass. App. Ct. 907 (1991). The defendant alleged that the affidavit in support of a search warrant contained deliberately false statements regarding the past reliability of the anonymous informant. In support of this argument, the defendant filed an affidavit from a person claiming to be the informant which refuted in material ways the officer's statements in the affidavit. The court held that based on the informant's affidavit, the trial judge should have allowed oral testimony or interrogation of the police affiant by the judge.

"No knock" warrant. Commonwealth v. Chausse, 30 Mass. App. Ct. 956 (1991). The court held that a no knock warrant was properly issued where the prosecution established a particular need to enter the premises in a forceful manner without prior

warning. The court noted that there is adequate justification for a no knock entry if it may reasonably be inferred from the affidavit that, should the occupants be forewarned, there would be a threat to the safety of the police, the offenders may escape, or evidence sought may be destroyed. In addition to the fact that drugs by their very nature are easily disposed, there was additional information in the affidavit in this case that the defendant had recently moved to the location searched, the defendant was living between two residences, two of the three individuals who occupied the dwelling had previously sold drugs, and an informant had recently seen the defendant dividing the drugs into small packets for eventual sale.

No basis of knowledge or independent verification of information from informant. Commonwealth v. O'Brien, 30 Mass. App. Ct. 807 (1991). An unidentified informant told a police officer that a man named Ostrander was involved in the larceny of two Ford pickup trucks. The police verified that two Ford pickups had been stolen from the area. Ostrander was arrested on unrelated charges, and one of the stolen trucks was found outside his apartment. The informant told the officer that it believed the second truck was parked behind a particular apartment building and that a person named "Ralph," who lived in the building, got the truck from Ostrander. The informant said that Ralph drove a car with Rhode Island registration. The police saw a pickup behind the building indicated by the informant, and saw a car with Rhode Island plates in front of the building. The car was listed to an address on Eddy Street in Providence, and the police had seized from Ostrander's apartment a set of plates traced to a different address on Eddy Street. Based on this information, the police obtained warrants to search the car, the pickup truck, and the apartment in which Ralph supposedly lived.

The court held that the affidavit in support of the search warrant did not contain probable cause to believe stolen property could reasonably be found in the apartment. There was no indication in the affidavit of the informant's basis of knowledge concerning "Ralph's" involvement with the stolen vehicles, nor was there sufficient independent verification of the informant's allegations. For example, the truck the police saw behind the apartment did not fit the informant's description of the stolen truck. Nor was there any basis for the informant's assertion that Ralph lived in the apartment, and no independent verification of that fact.

Informant's statements established basis of knowledge and were corroborated by independent investigation. Commonwealth v. Gates, 31 Mass. App. Ct. 328 (1991). A first time informant told police that Harris made weekly runs to pick up cocaine using two specific automobiles, which police determined were registered to members of Harris's family. The informant showed the police the residence of a man named "Lee" (the defendant's

first name), where she saw cocaine distributed. That residence was the defendant's. The informant also told the police that the driver of a black Fiero was heavily involved in drug distribution. Police saw a black Fiero at the defendant's residence, which was registered to an individual who had been arrested for possession of narcotics. Harris had also been arrested for possession of drugs, and the defendant had a long criminal record.

During surveillance of the defendant's residence, the police saw a man named Parent leaving. The police had searched Parent's house previously and found drugs and slips of paper with the name "Lee" and notations consistent with drug transactions. At various times during surveillance, the police saw Harris's car and/or the black Fiero at the defendant's residence. Within 72 hours of the affidavit, the informant said Harris offered to sell her cocaine.

The court held that the information from this first time informant established her basis of knowledge because it specified that she saw cocaine distributed and that Harris had recently offered to sell her cocaine, and further established her veracity because there was police corroboration of detailed information she provided.

B. Warrantless Searches.

Police not required to seek anticipatory warrant. Commonwealth v. Killackey, 410 Mass. 371 (1991). The warrantless search of a van was proper where for several months Lee police had been investigating a group from Lee for narcotics use, and learned that the group would meet at a particular location in Lee, then travel to a tenement in Holyoke, which Holyoke Police indicated was a known distribution point for heroin and cocaine. The police followed the defendant, a member of the group, from the meeting place in Lee to the tenement in Holyoke, where he spent twenty minutes and then went to the courthouse in Lee. When the defendant exited the van, the police detained him, searched the van, and found cocaine, heroin, and drug paraphernalia.

The court stated that police are not required to obtain an anticipatory warrant, and could not have done so in this case, since they had not seen the van used in any of the group's previous trips to Holyoke, and did not have probable cause to search the van before the defendant left Holyoke and returned to Lee. The likelihood that the evidence would have been removed from the van before the police could obtain a warrant made the circumstances exigent, so a warrantless search of the van was proper.

Inventory policy must specify procedures for searching closed container. Commonwealth v. Rostad, 410 Mass. 618 (1991). During booking, a police officer unzipped and opened the defendant's handbag and inventoried the contents, which included packets of drugs. The police department had a written

inventory search policy which stated that a police officer "shall search the arrestee and make an inventory of all items collected. The arrestee shall be asked to sign the inventory list."

The court held that the drugs should have been suppressed because the police department's written inventory search policy did not specifically require the police to open a closed container carried by the arrestee upon his or her person.

Therefore, your department's written inventory policy must contain specific guidelines concerning the search of closed containers. Please contact your District Attorney's office or the Attorney General's office for suggested language.

Frisk for weapons during field interrogation. Commonwealth v. Fraser, 410 Mass. 541 (1991). Police officers responded to a radio broadcast that a man with a gun was in a brown Toyota parked in a particular high crime area. At that location, the officers did not see a brown Toyota, but saw a group of young men, including the defendant, standing on the sidewalk. An officer who saw the defendant bend down behind a white pickup truck as though to pick something up or put something down approached the defendant and identified himself as a police officer. The defendant stood with his hands in his coat pockets. The officer asked the defendant to remove his hands from his pockets, but the defendant did not respond. The officer then frisked the defendant and found a loaded handgun.

The court held that by merely approaching the defendant, identifying himself as a police officer, and asking the defendant to take his hands out of his pockets, the officer did not "seize" the defendant within the meaning of the fourth amendment, and the officer therefore had a legitimate basis for being in the immediate proximity of the defendant. The court further held that the radio broadcast, combined with the factors at the scene listed above, were sufficient to support a "reasonable suspicion" that the officer's safety or that of others was in danger, justifying the protective frisk of the defendant.

Protective frisk for weapons cannot extend to search for evidence. Commonwealth v. Ferguson, 410 Mass. 611 (1991). A woman flagged down police officers who told them that a man had pointed a gun at her. She gave them a detailed description of the man and indicated the direction he had gone. Within a minute, the officers saw the defendant, who met the description, and asked him to come to the cruiser. The defendant fled, and an officer pursued him on foot. As the defendant jumped over a fence, the officer grabbed his jacket and the defendant ran out of it. The officer noticed the jacket was heavy, and, while patting it down for weapons, noticed a plastic bag protruding from the pocket. He pulled the bag out of the pocket and found that the bag contained cocaine.

The court noted that based on the information from the woman, the officer was justified in attempting to conduct a threshold inquiry of the defendant. However, the officer did not have probable cause to search the pocket, and therefore was not justified in seizing the plastic bag, since the record did not show that the officer saw the drugs before he knew the jacket did not contain a gun, or that he saw the drugs before pulling the bag out of the pocket. As soon as the officer determined that the jacket did not contain a gun, there was no basis for the search.

No pursuit without reasonable suspicion. Commonwealth v. Pena, 31 Mass. App. Ct. 201 (1991). Plainclothes police officers in unmarked cruisers were conducting surveillance of a house as a result of receiving information from an informant. A car parked near the house, and a man got out of the car and walked down the driveway and into the rear of the house. About ten minutes later, the man and the defendant came out of the house and walked toward the street. A police officer walked toward the men. The defendant made eye contact with the officer and ran to the house. An officer saw a plastic bag of white powder in the defendant's hand. The officers ran into the basement, where they seized the bag which contained cocaine.

The court held that there was no reasonable suspicion of criminal conduct prior to the chase, since the defendant was on private property, his conduct--walking up a driveway--was not suspicious, and he ran only after making eye contact with a man in plainclothes who exited from an unmarked vehicle parked in the driveway. The court noted that while an attempt to avoid contact with the police may be considered along with other factors, an attempt to elude the police once pursuit begins may not be considered.

Controlled buy establishing probable cause and exigent circumstances. Commonwealth v. Olivares, 30 Mass. App. Ct. 596 (1991). After being arrested, a named informant, Braga, agreed to cooperate with the police by setting up a buy with his supplier, the defendant. In the presence of police, Braga made calls to the defendant setting up the buy at the defendant's place of business. While police conducted surveillance at the defendant's place of business, Braga went into the building, and, when he came out, gave a prearranged signal that he had completed the buy. The police, without checking to see that Braga had cocaine on his person, entered the building, arrested the defendant, and conducted a search of the immediate area.

The court held that the warrantless search of the defendant's business premises was proper. Braga's reliability and basis of knowledge were established by his admission to participating in drug buys from the defendant after his arrest, his actual participation in the controlled buy, as well as independent police observation of the informant's telephone calls to the defendant and the personal meeting between the

two. Exigent circumstances existed since probable cause did not arise until the moment the informant alerted the officers that the buy had been completed.

Administrative search must be objectively reasonable. Commonwealth v. Bizarria, 31 Mass. App. Ct. 370 (1991). The supervisor of the auto theft unit of the Registry of Motor Vehicles, along with five police officers from the "Governor's Auto Strike Force," went to the defendant's auto body shop. The supervisor from the Registry informed the defendant that he was there to conduct an administrative inspection to examine records of the vehicles he was working on, and that the other officers would be checking the vehicles. The search included examination of vehicles (looking under hoods and scratching off paint) and auto parts throughout the building.

The court held that the warrantless search of the defendant's garage was not a valid administrative search. The search was not an objectively reasonable inspection, because G.L. c.90, §32 does not provide a proper limitation on the time, place, and scope of the inspection, it does not limit the scope of the search to records or motor vehicles, but permits a general search of the premises, and because the Registry did not have any standard procedures governing administrative searches. Moreover, the defendant did not consent to the search, since he cooperated only because he was told to do so.

No reasonable suspicion to justify stop of car. Commonwealth v. Carrasquillo, 30 Mass. App. Ct. 783 (1991). An unidentified informant told a police officer that the informant could probably purchase cocaine from the defendant at the defendant's residence. The informant and an undercover officer attempted to make a purchase from the defendant that day, but reported to the officer that they were unsuccessful. They stated that they had information that the defendant had gone to New York City and would return early that afternoon, accompanied by a Hispanic male, and would be transporting cocaine in the defendant's car. The police set up surveillance on the main route to New York City. They saw the defendant's car, followed it for a while, then stopped it.

The court held that the stop of the defendant's car was illegal. There was no information concerning the informant's basis of knowledge or reliability, nor was there information concerning the undercover officer's basis of knowledge of the defendant's trip to New York City. The information given to the police, together with police corroboration, did not give rise to a reasonable suspicion that the defendant had committed or was in the process of committing a crime.

C. Right To Challenge Search.

No expectation of privacy in dropped ceiling in common hallway outside apartment. Commonwealth v. Montanez, 410 Mass. 290

(1991). During the execution of a search warrant for the defendant's apartment, the police searched the area above the dropped ceiling in the hallway outside the defendant's apartment. The court held that the defendant had no reasonable expectation of privacy in the area above the dropped ceiling since he neither owned, nor controlled access to, the hallway, which was a common area, freely and frequently used by people other than the defendant. The court noted that a person would have a reasonable expectation of privacy in a locked container in a common area (if permitted by lease or agreement to store items there), or in a mailbox outside an apartment in a common area.

No target standing in circumstances. Commonwealth v. Scardamaglia, 410 Mass. 375 (1991). The police, tipped off by a confidential informant that Burnham had just purchased cocaine from the defendant, stopped Burnham. Burnham told them that he had just purchased the cocaine found on him from the defendant at the defendant's home. Based on this information, the police obtained a search warrant for the defendant's home. The defendant challenged the search of his home, claiming that probable cause to search his home was obtained by an allegedly illegal stop of Burnham, and that the defendant was a target of the stop.

Without deciding whether it will accept "target standing" (right to challenge allegedly illegal search or seizure of another) in any circumstance, the court held that in this case the defendant was not entitled to challenge the stop of Burnham because no tangible evidence seized in the allegedly illegal stop of Burnham was introduced against the defendant, the officer's conduct was not significantly improper, and the question of probable cause to search Burnham was at least a close one.

II. NARCOTICS OFFENSES

A. Random Sampling.

Random sample of drugs sufficient to establish weight and content. Commonwealth v. Johnson, 410 Mass. 199 (1991). Analysis of a random sample of 9 plastic bags out of a total of 71 bags was sufficient to determine the identity of the contents of the other plastic bags (cocaine), and averaging the weight of the randomly sampled plastic bags was sufficient to derive the net weight of the 71 bags.

B. Expert Testimony.

Personal use v. distribution. Commonwealth v. Johnson, 410 Mass. 199 (1991). A detective who had been a police officer for 8 years and a narcotics investigator for 2 1/2 years, with special training in narcotics investigation, and who had

participated in at least 100 narcotics investigations, was qualified to testify as an expert that the amount of cocaine possessed by the defendant was consistent with an intent to distribute and not with personal use.

Drug dealers' characteristics. Commonwealth v. Munera, 31 Mass. App. Ct. 380 (1991). Expert testimony as to the use by drug dealers of samples wrapped in dollar bills, and the opinion that the chunk cocaine wrapped in a dollar bill in the defendant's pocket was more consistent with a dealer's sample than with personal use, was admissible to aid the jury in understanding matters beyond their common experience. While expert testimony about stash pads and the keeping of a low profile by certain drug dealers, which was unrelated to the defendant in this case, may have been otherwise objectionable, it was admissible to rebut the defendant's trial strategy, which stressed his simple life-style in light of the value of the cocaine found.

C. Defenses.

Medical necessity defense in narcotics prosecution. Commonwealth v. Hutchins, 410 Mass. 726 (1991). The defendant was charged with possession and cultivation of marijuana and THC, and attempted to raise the defense of medical necessity, claiming that the use of marijuana alleviated symptoms of his chronic illness. The SJC held that the trial court properly refused to allow the defendant to present such evidence to the jury. In weighing the "competing harms," the court held that the alleviation of the defendant's medical symptoms would not clearly and significantly outweigh the potential harm to the public were the court to excuse his cultivation of marijuana based on medicinal reasons.

Entrapment defense. Commonwealth v. Hardy, 31 Mass. App. Ct. 909 (1991). The arresting officer testified that on two occasions the defendant arranged purchases of cocaine for him. The defendant testified that on at least five separate occasions he was approached by the officer, who inquired about buying drugs, and told the officer that he did not sell or use drugs. According to the defendant, only after repeated badgering by the officer did he agree to purchase drugs for the officer.

The court held that on its face, the defendant's testimony entitled him to an entrapment instruction. While mere evidence of solicitation is insufficient to raise the defense of entrapment, any evidence that the police went beyond a simple request and pleaded or argued with the defendant entitles the defendant to an entrapment instruction.

D. Evidence Of Possession.

Mere presence not sufficient proof of possession. Commonwealth v. Handy, 30 Mass. App. Ct. 776 (1991). During the execution of a no-knock warrant, police arrested the defendant who was trying to flee through a first floor window. Police seized cocaine and related paraphernalia from the second floor. Since the defendant had no cocaine or large amount of cash on him, made no admissions to the police, did not own, rent, or stay in the house, and tried to escape through a barred window indicating his lack of familiarity with the house, the evidence failed to link the defendant to the contraband. The defendant's mere presence in the house was insufficient to prove he possessed the drugs seized.

III. ADMISSIONS AND CONFESSIONS

A. Waiver of Miranda rights.

Commonwealth v. Hussey, 410 Mass. 664 (1991). The defendant was in custody in connection with an armed robbery, as well as being a suspect in two murders. The police advised the defendant of his Miranda rights both orally and by having him sign a Miranda card prior to interrogation, and advised him of his right to use the telephone. After first denying his involvement in the armed robbery, the defendant expressed doubt as to whether he should talk or "shut ... up." The interrogating officers said nothing and waited. The defendant asked for a telephone, and in the officer's presence attempted to reach an attorney. When he was unsuccessful, the police, without attempting to question the defendant further, gave him a telephone book. After paging through the book, the defendant shoved it aside, indicated he did not wish to wait any further, stated he was ready to make a statement, and confessed to the murders.

The court held that, while a defendant has a continuing right to cut of questioning at any time, to do so, the defendant must expressly indicate unwillingness to continue or affirmatively request an attorney. Here, the defendant's expression of "momentary indecision" about whether or not to remain silent did not invoke the right to remain silent, and his attempt to call his attorney was not an affirmative request for an attorney. Once it became reasonably apparent that the defendant wanted to speak to an attorney, the police did not continue interrogation or do anything to interfere with his right to have counsel present. Instead, they waited until the defendant, on his own, decided to speak, thereby assuring that his Miranda rights were voluntarily waived.

Handwriting exemplars. Commonwealth v. Buckley, 410 Mass. 209 (1991). At the crime scene of a murder (a convenience store), a paper bag bearing the words "will open at 7:30" was taped to

the inside of the locked front door. During the investigation, the police asked the defendant to go to the police station for questioning. The defendant voluntarily went to the police station and received and waived his Miranda rights. At the police request, the defendant printed the words "will open at 7:30." He provided additional handwriting exemplars to the police two days later after receiving and waiving Miranda rights.

The court first held that the taking of the exemplars did not violate the defendant's federal constitutional right against self-incrimination because they were not "testimonial communication." (The court noted that the defendant did not raise a claim under the state constitution. The court could reach a different conclusion under the state constitution.) The words which appeared on the paper bag were not misspelled, so any misspelling by the defendant would have been exculpatory; the trooper told the defendant to print the words, so choice of penmanship was not sought; and the words the defendant were asked to write were common and uncomplicated.

Moreover, the court held that regardless of whether the exemplars were testimonial, taking them was proper since the defendant voluntarily, knowingly, and intelligently waived his Miranda rights before giving the handwriting exemplars. Finally, the court held that the exemplars were not obtained in a custodial situation, since the interviews occurred after the defendant voluntarily came to the station, he was not a suspect at the time of his initial questioning, the interviewing officers were in plain clothes and unarmed, and the defendant left the station when the interview concluded.

B. Not Entitled to Miranda.

Motorist stopped for OUI not entitled to Miranda warnings before field sobriety tests. Commonwealth v. Ayre, 31 Mass. App. 17 (1991). A motorist stopped on suspicion of operating under the influence argued that he was entitled to Miranda warnings before being required to recite the alphabet and count during the leg lift test. The court noted, however, that persons temporarily detained pursuant to routine traffic stops are not in custody, and therefore not entitled to Miranda warnings. Here, the encounter was brief, took place in public view, and there were no other significant factors suggesting a coercive environment.

The court did indicate that there may be cases where field sobriety tests may be considered custodial interrogation, depending on the custodial circumstances, and whether the test reveals the defendant's thought processes, for instance asking the driver to calculate the date of his or her sixth birthday.

The court further stated that it was improper for a police officer to testify that the defendant refused to cooperate during booking since that testimony commented on the defendant's right to remain silent, and that the police had to

take some information from a prior arrest card, since that was improper evidence of the defendant's prior criminal record.

Inmate not acting as government agent. Commonwealth v. Harmon, 410 Mass. 425 (1991). While incarcerated on an unrelated charge, the defendant told another inmate that he was responsible for the murder of a seventy-five year old man. The inmate then contacted a police officer with whom he had a friendly relationship. The officer had arrested the inmate on a number of occasions in the past, and the inmate called the officer two or three times a month. When the inmate told the officer about the confession, the officer told him to "keep his ears open." Later, the inmate called the officer and told him that the defendant had given him details of the murder and that he took notes of the conversations he had with the defendant.

The SJC held that the inmate properly testified at trial about the defendant's statements to him. The defendant's right to counsel was not violated by the conversations with the inmate, since the inmate had not entered into an agreement with the government and therefore could not be considered a government agent. The court specifically noted that the officer's suggestion to the inmate to "keep his ears open," especially when made after the inmate had already come forward with information, did not establish an agency relationship.

IV. IDENTIFICATION

Commonwealth v. Holland, 410 Mass. 248 (1991). The victim's selection of the defendant's photograph from an array of 16 photographs was not unnecessarily suggestive even though the victim had already been shown an array in which the defendant's picture appeared, and the defendant's photo was the first photo on the first page of the second array, since the victim had ample opportunity to see the defendant at the time of the crime and prior to the arrays had accurately described the defendant as the assailant. The detective's suggestion to the victim during the second array that she concentrate on facial features "that don't change" was commonsense and did not target the defendant's photograph or create a likelihood of misidentification.

Commonwealth v. Riccard, 410 Mass. 718 (1991). At trial, a witness identified the defendant as the man he saw near the scene of a stabbing, although the witness had been unable to identify the defendant at a probable cause hearing three weeks after the incident. Since the witness had seen a photo of the defendant one or two days before the trial during a meeting with the police detective and prosecutor, his in-court identification was unduly suggestive, and was struck from evidence. The SJC held that the detective should not have been permitted to testify at trial that the victim had identified the defendant's picture during the meeting, since that

identification was unduly suggestive and was the only evidence clearly identifying the defendant as the perpetrator.

Commonwealth v. Morgan, 30 Mass. App. Ct. 685 (1991). None of the five witnesses to an armed robbery could make an in-court identification of the defendant as the robber (who was wearing a mask during the robbery), although a number of the witnesses described the clothing that the robber was wearing during the robbery. One of the witness's descriptions was consistent and two of the witness's descriptions were inconsistent with the clothes the defendant was wearing at the time of his arrest. To corroborate the first witness's testimony, a police officer testified that the witness gave a similar description of the robber's clothing just after the robbery.

The Appeals Court held that the officer should not have been permitted to testify as to the earlier description since, at trial, the witness did not acknowledge giving the police officer a description of the defendant, and the witness's description at trial varied from the description ascribed to him by the officer.

V. SEXUAL OFFENSES

A. Evidence.

Evidence of prior conduct. Commonwealth v. Calcagno, 31 Mass. App. Ct. 25 (1991). In a prosecution for indecent assault and battery, the prosecution properly introduced evidence that the defendant had sexually abused the victim in the past, to show a pattern of conduct, intent, and the relationship between the defendant and victim.

Fresh complaint evidence. Commonwealth v. Lavalley, 410 Mass. 641 (1991). The court held that a videotaped police interview of a rape victim conducted on the day of the incident was admissible as fresh complaint evidence to corroborate her in-court testimony. The court noted that the videotaped statement was consistent with the victim's in-court testimony and was cumulative of the fresh complaint testimony of five witnesses.

However, the court called into question the use at trial of details of the fresh complaint in the Commonwealth's case-in-chief to corroborate the victim's in-court testimony, because of the danger that the jury will use the details of the fresh complaint substantively to convict a defendant.

Reputation evidence. Commonwealth v. Arthur, 31 Mass. App. Ct. 178 (1991). The court held that an eighth grade class of 150 students is a sufficiently discreet and identifiable community from which a reputation may be drawn. Therefore, at a trial for indecent assault and battery, classmates of the victim, who had known her for a number of years, should have been allowed

to testify as to the victim's reputation within that community for lying and exaggeration.

B. Defenses.

Reasonable good faith belief in consent is not defense to rape. Commonwealth v. Simcock, 31 Mass. App. Ct. 184 (1991). The Appeals Court affirmed the indecent assault and battery convictions of four men who engaged in sexual intercourse with the victim, who suffered from brain damage, after they all watched the movie "Dirty Dancing." The court held that a defendant is not entitled to a jury instruction that, if he had a reasonable and good faith belief that the victim consented, he is not guilty of rape. The court further held that the trial judge properly instructed the jury that the jury could take into consideration the victim's mental state and degree of intoxication in considering whether she consented.

C. Elements Of Offenses.

Conduct did not occur in public place. Commonwealth v. Beauchemin, 410 Mass. 181 (1991). The court held that the defendant should have been found not guilty of being a lewd, wanton, and lascivious person under M.G.L. ch. 272, §53, where the allegedly illegal conduct occurred in a car parked in a supermarket parking lot during a heavy snowstorm, and in the faculty lounge of a high school during a weekend debate meet. Those locations were not public places, since there was little likelihood that a casual passerby would observe the complainant and the defendant engaged in sexual conduct.

Lesser included offenses. Commonwealth v. Farrell, 31 Mass. App. Ct. 267 (1991). Simple assault and battery is not a lesser included offense of indecent assault and battery.

VI. MOTOR VEHICLE OFFENSES

A. Rights Pursuant To G.L. c. 263, §5A.

Taken to hospital following before booking. Commonwealth v. Ames, 410 Mass. 603 (1991). The defendant was arrested more than three hours after an accident and charged with operating a motor vehicle under the influence of alcohol. At the defendant's request, the officer took him to the hospital for medical attention. At the hospital, an officer told the defendant that he could take a blood alcohol test, but that he could not take a breathalyzer test because there was no breathalyzer machine at the hospital. The defendant declined the blood test, saying he wanted a breathalyzer test. The defendant was not booked until almost five hours after the accident, and was not further advised of his rights, although a copy of G.L. c. 263, §5A, was posted at the booking desk.

The court found that in transporting the defendant to a hospital for a medical examination and in advising him of his right to have a blood alcohol test by a neutral health care provider, the police afforded the defendant more than he was entitled to under §5A, and therefore their failure to advise him that he was entitled to an exam by a physician of his own choice was inconsequential.

The court noted that it is recommended that a defendant who is taken to a hospital before booking be fully advised of his rights at that time, even though §5A does not require advising a person of his rights until booking.

Defendant requests breath test and examination by physician. Commonwealth v. Lively, 30 Mass. App. Ct. 970 (1991). At the barracks after the defendant was arrested for operating a motor vehicle while under the influence of intoxicating liquor, a trooper pointed out a posted, visible copy of various rights, including those afforded by G.L. c. 263, §5A, then advised the defendant of his right to counsel. The defendant made a number of telephone calls to his family and his attorney. Thereafter, the defendant was orally advised of his rights under G.L. c.263, §5A, and he requested to see a physician. The Trooper did not immediately respond to this request but continued describing the defendant's right to a breathalyzer test and a telephone call. The defendant agreed to take a breathalyzer test but stated that he wanted to see a physician first. The Trooper told the defendant that he could contact a physician after the completing the breathalyzer test. Breathalyzer tests were administered, the defendant was released on bail, and then unsuccessfully sought to obtain a blood test at a hospital.

The court held that directing the defendant's attention to the posted rights, coupled with his access to a telephone, satisfied the police obligation under G.L. c. 263, §5A. Moreover, when a defendant opts to both accept an offer of a breathalyzer test and claim his right to an examination by a physician, failure to permit the defendant to be examined by a physician until completion of the breathalyzer test is not unreasonable interference with his or her rights.

B. Probable Cause To Arrest.

Probable cause on basis of collective information. Commonwealth v. Rivet, 30 Mass. App. Ct. 973 (1991). While driving a pickup truck, the defendant was involved in a head-on collision with an automobile, seriously injuring the driver of the car and killing the driver's wife and child. Two officers arrived at the scene. The arresting officer spoke with the defendant for twenty-five minutes. The odor of alcohol on the defendant's breath, his admission to having "only one beer," his glassy eyes, and the extent of the accident itself combined to support an inference of intoxication. Although the record did not disclose that the two officers had shared information,

since they had worked in concert within easy reach of each other for at least fifteen minutes, and were engaged in a joint investigation, probable cause should be evaluated on the basis of collective information. Thus the information that one officer obtained from witnesses, that the pickup was travelling between sixty and seventy miles per hour in a thirty miles per hour zone before the impact, was attributable to the arresting officer to support probable cause to arrest.

C. Pursuit Over Town Line.

Pursuit over town line for arrestable offense proper. Commonwealth v. O'Hara, 30 Mass. App. Ct. 608 (1991). A police officer located near the town line at 3:15 a.m. observed the defendant's vehicle traveling between 10 and 37 miles per hour (the posted speed limit was 40) and cross the center line on a few occasions. No other vehicles were in the area. The officer followed the defendant's vehicle into the next town, then stopped the defendant and arrested him for driving under the influence of alcohol. The court upheld the legality of the arrest since the officer pursued the defendant based on a reasonable belief that the defendant was committing an arrestable offense, either operating a motor vehicle while under the influence of an intoxicating substance or negligently so as to endanger, unlike in Commonwealth v. LeBlanc, 407 Mass. 70 (1990), where an officer pursued the defendant over the town line for a nonarrestable offense.

VII. MISCELLANEOUS

No Plea to reduced charge over Commonwealth's objection. Commonwealth v. Gordon, 410 Mass. 498 (1991). The defendant was charged with two counts of murder in the first degree. Prior to trial, the defendant indicated he was willing to plead to second degree murder, and the prosecutor objected. The judge accepted the pleas, and the prosecutor again objected. The Commonwealth appealed, and the Supreme Judicial Court held that the judge had no authority to accept a plea to a reduced charge prior to trial over the prosecutor's objection.

The SJC noted that the trial court does have authority to dismiss indictments for insufficient or tainted evidence before the grand jury, or based on double jeopardy, and can reduce a charge after the Commonwealth has had the opportunity to present its case.

Firing test proper, range fee illegal. MacNutt v. Police Comr. of Boston, 30 Mass. App. Ct. 632 (1990). When the plaintiff applied for renewal of her license to carry a firearm, she was required to take a firing test and pay a range fee to recover the cost of the firing test, in addition to paying the license fee. The plaintiff challenged both the test and the range fee. The Court held that the imposition of a test focusing on

the safe handling and proficient firing of a firearm was proper, but that, since it was not authorized by city ordinance, the Police Commissioner could not impose a fee to recover the cost of the firing test.

Search for missing witness. Commonwealth v. Childs, 31 Mass. App. Ct. 64 (1991). The Commonwealth conducted a search, using credit card data bases, which indicated that a person using the same name, age, and social security number as a missing witness had obtained a credit card in Fort Myers, Florida. The Commonwealth contacted the witness's parents, who lived in the Fort Myers area, but the parents denied knowledge of their son's address. The prosecutor did not contact the police in Fort Myers, nor did he issue a warrant to compel the attendance of the out-of-state witness. The trial judge found the witness to be a missing witness, and allowed the Commonwealth to use the witness's prior testimony at trial.

The Appeals Court held that the Commonwealth should not have been permitted to introduce the witness's prior testimony, because the prosecutor failed to make a good faith effort to obtain the witness's presence at trial. The prosecutor should have determined if the witness actually was in Fort Myers, and if so, sought to secure the witness's attendance at trial pursuant to the Uniform Law to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, G.L. c. 233, §13A.

Possible police perjury in grand jury and at trial does not necessarily warrant new trial or dismissal of indictments. Commonwealth v. Waters, 410 Mass. 224 (1991). The defendant was convicted of, among other charges, assault and battery with a dangerous weapon in connection with the shooting of a police officer. After he was found guilty, he approached federal authorities and claimed that police officers had promised him favorable disposition of his criminal case if he paid them $300,000, and when he paid only a portion of the money, the officers lied about the circumstances of the shooting to the grand jury and at trial. The defendant then filed motions to dismiss the indictments and for a new trial in connection with his criminal conviction, which were denied.

The Supreme Judicial Court upheld the trial court's denial of the defendant's motions, even though there were strong indications of police misconduct and perjury. The court held that the actions of the police officers could not be attributed to the prosecution since the actions were not in furtherance of law enforcement but were in support of an extortion scheme. The court further held that in the particular circumstances of this case there was other evidence at trial of the defendant's guilt that was untainted by the police misconduct.

VIII. UNITED STATES SUPREME COURT CASES

48 hours between warrantless arrest and probable cause determination. County of Riverside v. McLaughlin, 111 U.S. 1661 (1991). As a matter of federal constitutional law, a determination of probable cause must be made by a "neutral magistrate" within 48 hours of a warrantless arrest as a prerequisite to an extended pretrial detention. If the probable cause determination is not made within 48 hours, the government must demonstrate a "bona fide emergency or other extraordinary circumstance." Intervening weekends do not count as an extraordinary circumstance.

There is currently a case pending before the Supreme Judicial Court concerning this issue as it relates to the Massachusetts court system.

Right to counsel. McNeil v. Wisconsin, 111 S. Ct. 2204 (1991). The defendant appeared in court, represented by counsel, on a charge of armed robbery. He was held in lieu of bail, and while in jail was interviewed three times by police about crimes unrelated to the armed robbery after being advised of his Miranda rights each time, and signing forms waiving those rights. The defendant made statements incriminating himself in the unrelated charges, and was arrested and subsequently convicted of those crimes.

The Supreme Court held that the defendant's request for counsel's assistance during the bail hearing constituted only an invocation of his Sixth Amendment right to counsel, which was limited to the armed robbery, and that the request did not constitute an invocation of his Miranda right to counsel as to the unrelated charges, which requires "some statement that can reasonably be construed as an expression of a desire for the assistance of counsel in dealing with custodial interrogation by the police." Thus, while the defendant's assertion of his Sixth Amendment right to counsel (as well as his earlier refusal to answer questions) precluded any questioning about the armed robbery, questioning him about the unrelated crimes was proper.

However, if the defendant had asked for an attorney when initially questioned about the armed robbery, the police would have been precluded from initiating any questioning about any other crimes in the absence of counsel.

ASSISTANCE AND CONTACTS AT THE OFFICE OF THE ATTORNEY GENERAL

Below is a list of individuals at the Office of the Attorney General who you can call for assistance. The main office number for all extensions listed below is (617) 727-2200. The office address is: Office of the Attorney General, 1 Ashburton Place, Boston, MA 02108.

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John T. Montgomery, First Assistant	2057
CRIMINAL BUREAU	
Edward Rapacki, Bureau Chief	2810
Paula DeGiacomo, Chief, Appellate Division	2826
Martin Healey, Chief Special Prosecutions & Tax Unit	2868
Michael Cassidy, Chief, Narcotics Division	2517
Patricia Bernstein, Chief, Public Integrity Division	2856
David Burns, Chief, Special Investigations Division	2589
Lt. Edward Johnson, Chief, Criminal Investigations Division	2812
Martin Levin, Chief, Environmental Strike Force	2858
Maurice Cunningham, Chief, Asset Forfeiture Unit	2510
Michael Kogut, Chief Medicaid Fraud Control Unit	3814
James Bryant, Chief, Insurance Fraud Unit	2814
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FAMILY AND COMMUNITY CRIMES BUREAU	
Jane Tewksbury, Bureau Chief	2049
PUBLIC PROTECTION BUREAU	
Barbara Anthony, Bureau Chief	2925
LAW ENFORCEMENT NEWSLETTER	
LaDonna Hatton, Editor	2822

Law Enforcement Newsletter

FROM THE OFFICE OF THE
Attorney General
For The Commonwealth of Massachusetts

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Vol. I, No. 3 March 1992

TABLE OF CONTENTS

LAW ENFORCEMENT
NEWSLETTER

Letter from the Attorney General

An Urban Violence Action Plan: A Challenge to our Values

March, 1992

To Members of the Law Enforcement and Criminal Justice Community:

Crime and violence continue to devastate many of our urban communities. This crisis of urban violence erodes our confidence in the ability of government and law enforcement to protect our most vulnerable citizens and destroys the quality of their lives. Nevertheless, despite the importance of this issue, the resources devoted to its solution pale in comparison to other state and national issues, except for periodic responses when "drugs, gangs and guns" attract short-lived media attention.

Despite the generally valiant efforts of desperately under-funded police, prosecutors and community workers, and periodic political rhetoric about being "tough on crime," we as a society seem willing to abandon our cities and their economic, educational and social problems and needs. The sad fact is that the national and regional economic and fiscal crisis disproportionately affects urban areas, as does the level of crime and violence.

I have made the issue of urban violence a major priority in our office, and hope other leaders will as well, because fundamentally it is a question of equal protection and equal justice and, as such, is the most pressing civil rights issue facing us today. Tragically, most of the victims of urban violence and disintegration are upstanding, hard-working, law-abiding citizens trying to make a decent living for themselves and their families. Yet because many are poor, people of color, of diverse linguistic and cultural backgrounds, and single parents and children, they are vulnerable and powerless hostages to the fear and fact of violence and economic and social neglect.

There seems to be an attitude among those of us who do not live in urban areas that urban violence is someone else's problem. As long as it is confined to our inner cities it is not our concern. But, in truth, all of us are victims of urban violence. We must mobilize our strength, our commitment, and our resources to attack both the perpetrators of urban violence and its underlying causes. We owe it to our urban communities and to ourselves.

The causes of urban violence are multiple and complex; and so too must be the solutions. But this does not mean that there are no solutions. In fact, in the course of my first year in office, it has become crystal clear that many individuals, civic and community groups, and a variety of state and local public and private agencies in Boston and other urban areas have developed a wide variety of very effective responses. Some are short term, and some are long term. Some deal with the roots of the problem, and some focus on the numerous law enforcement issues of how best to restore order and tranquility in the neighborhoods presently under seige. I applaud these efforts to implement creative solutions to end urban violence. But I also recognize that, for a response to be truly effective, those who have already been working hard and those who have not yet begun to focus on this issue must combine their efforts in a cohesive, coordinated multi-disciplinary, public-private partnership approach in which issues of turf and politics are minimized. It is abundantly clear that every effort must be made to ensure that the solutions that do exist are put into place as quickly as possible and that, where solutions are not evident, the best minds available are brought together to find new solutions.

More importantly, we must all pledge ourselves to find and allocate the dollars needed to fund this effort. In the end, this is not a question solely of new revenue or taxes; it is a question of our values. We all know the dollars are available. The question is on what will we choose to spend those dollars?

The purpose of this letter is to outline what my office is doing in areas in which the Attorney General has some role -- either as a part of our core responsibilities, or, where others have primary roles, in areas in which I believe the Attorney General can play a role as a partner, supporter, coordinator or leader. <u>I welcome your ideas, comments, critiques and proposals</u>. I hope each of you will similarly seek to identify and develop, if you have not already done so, similar action plans. Together, we can begin to do all we can to stem the erosion and to empower our urban citizens to restore equal quality, dignity and justice to their communities.

I. Violence Prevention

A major factor contributing to urban violence is the socio-economic makeup of many urban areas. The breakdown of the family unit, the lack of equal educational, recreational, and employment opportunities, and the concommitant loss of hope and access to the "American Dream," are just a few of the reasons why the use of guns and knives, drug-dealing, and family violence have disproportionately greater prevalence and impact upon urban areas. Urban economic revitalization, coupled with enhanced educational and recreational opportunity, drug and alcohol abuse prevention and treatment, and family support are the keys to violence prevention. The following outline illustrates some of the Attorney General's actions and proposals for 1992:

- Continue several violence prevention grants for community and school-based mediation/conflict resolution programs in Springfield, Worcester, Somerville and Lowell;

- Our statewide School Superintendents Advisory Group will coordinate, support and implement (with District Attorneys) Project Alliance to prevent and eliminate drug and alcohol use and abuse; develop violence prevention programs; support the DARE programs; and promote equal education funding, including special and bi-lingual programs;

- Conduct Domestic Violence and Elder Abuse training for police officers from across the state;

- Participate in comprehensive community violence reduction efforts with Citizens for Safety, Boston Against Drugs (BAD), the Lawrence Violence Prevention Project and MHFA's Inner City Task Forces;

- Sponsor a statewide urban violence conference and seek to sponsor urban violence conferences with the District Attorneys in each county to identify for replication effective plans and techniques already being utilized, and to focus and promote coordination and partnerships between law enforcement agencies, private individuals and business leaders, and community groups working on violence prevention;

- Support the expansion of programs to provide mentors, peer leaders, and other role models for youth in urban areas, such as the "Adopt a Class" program of the MHFA and "Stand Tall Against Drugs;"

- o Support the development of alternative recreational programs and youth employment programs in urban areas, such as the Egleston YMCA job training program, and encourage the new Professional Sports Council to give priority to funding for school athletic programs;

- o Join with District Attorneys to provide training for police and prosecutors on family violence, hate crimes and juvenile justice issues;

- o Work with the medical community and Department of Public Health to support abuse prevention programs;

- o Continue our state agency urban violence task force to identify and support state efforts and programs geared to urban violence and prevention;

- o Continue our work with banks and other private businesses and community groups to find ways to bring business, jobs, and financial resources into urban areas, including:

  - * utilizing the Commonwealth Reinvestment Act to ensure that urban branches of banks are established and viable;

  - * working with private security firms and the local police to protect the security of urban businesses;

  - * working with the Commissioner of Banks to develop new regulatory standards on credit for businesses and individuals in urban areas, and to enforce the new Mortgage Regulations;

  - * working to ensure meaningful minority business participation on major construction projects;

  - * working with Chambers of Commerce to assist and support the development and growth of community-based businesses.

II. Law Enforcement Response

Prevention efforts alone cannot solve the problem of urban violence. While police, prosecutors, community activists, business people, religious leaders and others want to prevent urban violence, the law enforcement, and criminal and juvenile justice systems must be able to respond to crimes that do occur with swift, certain and fair justice. In the short term, we

play the central role in protecting victims and restoring a sense of order and justice. Some structural changes are crucial; but reform without funding is and will be meaningless. Police and District Attorneys must be adequately staffed, well-trained and have the tools to do their difficult job effectively. The combined problems of a woefully underfunded criminal justice system lacking coordination and direction, a court system in dire need of centralized management and administration and an archaic, incomprehensible sentencing system exacerbate urban violence dramatically. The following outlines some of the Attorney General's priorities in this area for 1992:

- Continue to work with many groups and individuals to bring about true Court Reform and managerial accountability for the alocation of limited resources;

- Continue to support the creation of a centralized criminal justice secretariat;

- Continue to support presumptive sentencing reforms to ensure greater uniformity and consistency, truth-in-sentencing, and a broad range of intermediate sanctions;

- Coordinate police training statewide by:

  - Developing an annual calendar of all training statewide, and working with training agencies to fill the gaps;

  - Providing executives and command officers policy and management training;

  - Providing training in specialized areas such as civil rights, environmental crime, and domestic violence;

  - Providing training to police regarding civil liability and internal affairs;

- Work with Police Chiefs to develop guidelines for the conduct of internal affairs proceedings;

- Support police efforts to implement community policing;

- Expand pilot projects to build bridges between police, prosecutors and Southeast Asian community groups;

- o Continue our Urban Court Strike Force, a group of specially-trained assistant attorneys general, working on loan to the District Attorneys in several urban areas;

- o Work to ensure that District Attorneys have the tools to successfully prosecute urban violence and youth gang cases, including:

  - Funding restorated to at least 1989 levels;

  - Enacting a state RICO law;

  - Institutionalizing a drug asset forfeiture management capacity;

  - Providing, with MDAA, staff training in specialized crime areas such as hate crimes and urban consumer fraud; and

  - Proposing the appropriation of funds for the creation of specialized juvenile prosecution units in the District Attorneys' offices;

- o Investigate (including joint investigations with the District Attorneys) and prosecute hate crimes and urban consumer fraud cases;

- o Implement with the United States Attorney and District Attorneys a procedure for the joint review of police shootings;

- o Work with District Attorneys and local housing authorities to combat narcotics distribution in housing projects;

- o Involve private security professionals and college/university police resources in law enforcement coordination, training, and outreach efforts.

III. Directing Office Resources To Urban Issues

The practice of "across the board" budget cutting has had a disproportionately adverse impact on urban communities, because they have the greatest and most acute problems. This uneven effect has been made even more severe by the economic condition of the Commonwealth, and has created an environment in which many urban residents are far more susceptible to being targets for, and victims of, scams and frauds. Accordingly, we made

the decision to give urban issues priority in all of our bureaus and divisions in order to attempt to have a positive impact on the underlying causes of urban violence. Furthermore, as the chief law officer of the Commonwealth, the Attorney General's office is attempting to encourage all state agencies to set similar priorities and to participate in an urban violence agenda. Toward this end we will continue in 1992 to do the following:

- Focus our Criminal and Public Protection Bureaus on frauds, scams and embezzlements affecting urban area victims;

- Focus our Narcotics Task Force on organized groups and major dealers and to seize their assets;

- Develop education programs for community groups on consumer frauds and scams;

- Promulgate regulations and support legislation designed to effect credit reform to ensure fair and equal access to credit in urban areas;

- Our Environmental Protection Division, Environmental Strike Force, Real Estate Division, and Public Protection Bureau will focus on urban issues, including lead paint removal, workplace safety, urban hazardous waste dumping, affordable housing, and pollution;

- Our Criminal Bureau and Family and Community Crimes Bureau will provide specialized assistance on Domestic Violence, crimes against the elderly, drug and alcohol education, and juvenile and youthful offender prosecution;

- Continue our Urban Violence Advisory Group and encourage executive agencies to adopt or participate in an urban violence agenda;

- Our Civil Rights Division will focus on urban civil rights issues in education, employment, housing and law enforcement and promote the establishment of law enforcement and police/community programs to forge relationships with linguistic, ethnic, national, racial, and cultural minority and immigrant communities;

- Continue to represent state agencies against challenges to decisions to locate new correctional facilities and community-based programs.

IV. Conclusion

The fact is that there is much to do if we are to stem the tide of urban violence. Many groups, individuals, and agencies already have been working hard. Others have not yet gotten involved. It is clear that only a concentrated, multi-disciplinary, long-term effort will succeed. All of us are needed. And the time is now.

I look forward to working with you, as members of the law enforcement and criminal justice communities, to find short-term and long-term solutions to the serious and complex problem of urban violence. As I said at the beginning, I welcome your comments.

Sincerely,

Scott Harshbarger

SH:mps

TOUGH QUESTIONS/STRAIGHT ANSWERS: GREY AREAS IN JUVENILE LAW

By: Roger A. Jackson, Assistant District Attorney
Juvenile Court Prosecutor, Cape & Islands District

A number of the same questions are often asked by parents to our Juvenile Prosecutor regarding rights, responsibilities, and remedies for misbehaving children. These questions undoubtedly are also directed at police officers. Here are some answers that may help.

Q. My 17 year old daughter Jill has left home and is living with friends I don't approve of. She won't be 18 for seven more months. What can I do to get her back?

A. Legally, nothing. Although in Massachusetts the age of majority is 18, there is no way to enforce parental rules after the 17th birthday. Jill cannot be compelled to return home, though she may if she wishes.

Q. John is 17 and living on his own. We are resigned to this but don't want to remain responsible for him and he wants to be able to sign his own papers, for school, medical treatment, etc. We've heard about something called an "emancipated minor" and we all think that's best. How do we go about it?

A. You don't. There is no such thing in Massachusetts. The rumor may have gotten its start because of certain rules in the Probate Court which involve exemption of child support for certain youths who have become self-supporting through entering the military or other means. Though still legally minors (under 18) they are, practically speaking, emancipated. There is, however, no such formal legal status as "emancipated minor."

Q. My daughter Andrea is 15 and starting to skip school and run away from home. This is having an awful effect on Tom, her twelve year old brother who is mouthing off a lot and cutting classes, too. I've heard about something called a CHINS petition. Will it help?

A. A runaway, truant, or persistently disruptive and misbehaving child may be brought before the court by the parent or guardian, appropriate school official, or police officer, depending upon the nature of the behavior. The function of the court in these cases is to refer the family to appropriate service agencies, counselors, the Department of Social Services, even medical facilities, to attempt to discover and remedy the cause of the inappropriate behavior.

A drawback of the procedure is that there is limited authority to force a truly recalcitrant - or troubled - child to accept these services since physical restraint, such as from running away, is virtually impossible under applicable laws. Removal to a foster home or residential facility is a possibility for extreme cases but even these remedies are limited.

Q. Michael, our 16 year old, has been staying out late, hanging around with the wrong crowd, and skipping school. He's totally out of control. I've been told I can lock him out of the house after a certain hour. Is this true?

A. No. You maintain a basic responsibility to your son, whatever the behavior, until he is 18. You cannot lock him out of the house or otherwise refuse to provide for him. To do so can expose you to legal consequences including allegations of child neglect, especially if you do this over a prolonged period of time.

Q. What if we provide an alternative living arrangement with friends?

A. If the child is willing to go along with this and it works, fine. But you cannot shift your legal responsibilities to someone else by informal agreement. Further, such arrangements rarely work or even last long. After a brief "honeymoon" period, the basic problems recur.

Q. What can we do, legally? It's only going to get worse next month when he gets his car.

A. His car?

Q. Yes. Michael is a hard worker and has saved money for a car. He's got his permit and goes for his road test next month and as soon as he gets that he'll buy a car and we'll never see him.

A. Don't let him get his license. If he's under 18, you have to sign your permission. Make it clear to Mike that you won't consent until he cleans up his act and <u>keeps</u> it clean long enough for you to be sure there's a real change. Once he actually has the license, you can't take it back.

Q. But won't that make him even angrier and more rebellious? What if he gets violent?

A. Yes, any restraint on a kid's freedom may cause him or her to push harder. But from your description, what have you got to lose? If he does get violent, assaultive or

threatening, the police can help through the "domestic violence" procedures. In either case, unpleasant though it might be, it can show him you're serious about not enabling his misbehavior.

Of course, the situation may be beyond self help. The most any of these measures can do is demonstrate your willingness to stand by your values and perhaps motivate the teenager to want some change. The actual changes may require seeking professional help from counseling, most likely involving the whole family.

Q. What do we do if we suspect drug and alcohol abuse?

A. Don't try to handle it by yourself. Contact a professional in the school, the police department, or a local substance abuse clinic. Get their advice on how to make a determination of drug or alcohol abuse and, if it seems your child is into addictive abuse, seek help on how to confront him.

If you find alcohol or especially narcotics in your child's room or on his or her person, do not hesitate to contact the police. It will help your child to know that you will not harbor these substances in your home and the possibility of criminal prosecution may be a motivating factor to get whatever help may be needed. Many of the same principles apply here as to a child whose physical abuse activity has reached the stage where court referral becomes appropriate. In most cases, the law enforcement authorities will be more than cooperative with a parent who enlists their help before a street crime is committed or the teenager becomes severely damaged.1/

1/ The Office of the Attorney General has prepared a second printing of the Juvenile Procedures Manual for Police, a manual designed to assist police officers in understanding the legal requirements involved in their contacts with juvenile offenders. A copy of the Manual is available upon request from the Family and Community Crimes Bureau of the Attorney General's Office, 727-2200, ext. 2049.

TESTIMONIAL DINNER LAW

By: Peter Sacks, Assistant Attorney General

The Attorney General is frequently asked by both state and local officials for interpretations of the "Testimonial Dinner Law," G.L. c. 268, § 9A. This strictly-worded criminal law prohibits the sale of tickets for a testimonial dinner or other function held to honor a person employed in law enforcement and certain other agencies.

The purposes of the law are (1) to place persons in public service above any suspicion of being influenced by the purchase of such tickets, and (2) to relieve the public of any pressure, actual or implied, to buy such tickets in order to obtain favorable treatment or avoid unfavorable treatment by the person or agency involved.

In order to increase awareness of this issue, the full text of the law is set forth below, along with some of the most common questions and answers about its interpretation. Testimonial dinners may also raise questions under the state ethics laws, G.L. c. 268A; such questions may be directed to the State Ethics Commission (617/727-0060).

The testimonial dinner law provides as follows:

> No person shall sell, offer for sale, or accept payment for, tickets or admissions to, nor solicit or accept contributions for, a testimonial dinner or function, or any affair, by whatever name it may be called, having a purpose similar to that of a testimonial dinner or function, for any person, other than a person holding elective public office, whose office or employment is in any law enforcement, regulatory or investigatory body or agency of the commonwealth or any political subdivision thereof.
>
> Whoever violates any provision of this section shall be punished by a fine of not more than five hundred dollars.

QUESTIONS AND ANSWERS

1. To whom does the law apply?

"No person," wherever employed, may sell, offer for sale, accept payment for, or solicit or accept contributions for a testimonial dinner or function covered by the law.

2. What types of events are covered by the law?

The law applies to any testimonial dinner, affair, or function, by whatever name, that has as its purpose or one of its purposes the recognition or honoring of a person whose office or employment is in any law enforcement, regulatory or investigatory body or agency of the Commonwealth or any city, town, county, or other political subdivision. The bodies and agencies covered include (1) all police departments, (2) the staffs of the District Attorneys and the Attorney General, (3) the courts, (4) all other investigative and law enforcement bodies and agencies at the state or local level, and (5) all bodies or agencies at the state or local level that exercise regulatory powers, including licensing, zoning, and rate-setting functions.

3. Does the law apply to all employees of the covered agencies?

Yes, except for elected officials. Also, the law does not prohibit fundraising events for persons who are announced candidates for public office, so long as the clearly announced purpose of the event is to raise funds for campaign use rather than to honor the person for past service.

4. What are some examples of acts prohibited by the law?

The following are among the acts prohibited: (1) Selling tickets to a dinner to honor a police department official. (2) Asking for or accepting contributions to rent a hall for the purpose of holding an event to honor a judge or a court employee. (3) Accepting payments for admission to a function held to honor a member of a zoning or licensing board.

5. Isn't there any way to honor public employees?

Yes. (1) An event may be held to honor a person who is retiring, so long as the event, and all ticket sales for it, occur after the person's actual retirement date. (2) An event may be held to honor a person in a covered agency, so long as no tickets are sold or contributions solicited or accepted for the event. Meals may be sold, so long as persons may attend the event without buying a meal or otherwise having to pay any amount to the sponsor(s) of the event. (3) A person may be given an award or otherwise honored at an event, so long as the event is not promoted or advertised, either orally or in writing, as being wholly or partially for the purpose of bestowing the award or other honor.

RANDOM URINALYSIS TESTING OF POLICE OFFICERS IS UNCONSTITUTIONAL

By: Linda Nutting Murphy
Assistant Attorney General, Criminal Bureau

In Guiney v. Police Commissioner of Boston, 411 Mass. 328 (1991), the Supreme Judicial Court (SJC) considered whether a Police Department rule authorizing the random drug testing of police officers violated Article 14 of the Massachusetts Declaration of Rights (art. 14), which prohibits unreasonable searches and seizures.1/ The SJC reasoned that the record lacked any specific evidence supporting a concrete, substantial governmental interest that would be served by the random drug testing of police officers, and therefore found that the random aspect of the rule violated the Massachusetts State Constitution, specifically art. 14. Because this decision conflicts with federal constitutional law and affects all police departments in Massachusetts, this article summarizes the SJC opinion and offers guidance on some questions left unanswered by the Court.

PROCEDURAL HISTORY

In 1986, the Police Commissioner for the City of Boston issued rule 111, authorizing urinalysis testing of police officers on either reasonable suspicion or on a random basis. Robert G. Guiney, president of the Boston Patrolmen's Association, and acting as its representative, filed suit in United States District Court for the District of Massachusetts alleging that rule 111 violated the Fourth Amendment to the United States Constitution.2/ The Federal District Court agreed with the plaintiff and held that rule 111 was unconstitutional. Guiney v. Roache, 686 F. Supp. 956 (D. Mass. 1988). The police commissioner appealed and the First Circuit Court of Appeals overturned the District Court decision, ruling that rule 111 did not violate the United States Constitution.

1/ Art. 14 provides in pertinent part, "[E]very subject has a right to be secure from all unreasonable searches and seizures, of his person, his houses, his papers, and all his possessions."

2/ The Fourth Amendment to the United States Constitution provides in pertinent part, "The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Guiney v. Roache, 873 F.2d 1557 (1st Cir.), cert. denied, 493 U.S. 963 (1989). Guiney filed a petition for a writ of certiorari asking the United States Supreme Court to review the Appeals Court decision. The Supreme Court, however, declined to do so.

Guiney subsequently filed an action in state court challenging rule 111 on purely state constitutional grounds, specifically that the rule violated art. 14 of the Massachusetts Declaration of Rights. The Superior Court held that rule 111 did not violate art. 14 and ruled in favor of the commissioner. Guiney appealed and the Supreme Judicial Court granted the commissioner's motion for direct appellate review.

FEDERAL LAW

The Fourth Amendment was originally derived from art. 14 and both operate to protect the same basic right to be free from unreasonable searches and seizures. The SJC has ruled, however, that in a "special category" of cases art. 14 operates to provide greater protection than the Fourth Amendment. Traditionally, both constitutional protections require that a search or seizure be supported by a warrant, issued on the basis of probable cause, to meet the reasonableness requirement.

Alternatively, both the United States Supreme Court and the SJC have recognized a second approach in assessing whether a search or seizure is reasonable. Both Courts have employed a balancing test, "balancing the governmental need for the search against the search's intrusiveness into a person's reasonable expected privacy." It is the manner in which each Court applies the balancing test that art. 14 and the Fourth Amendment differ.

In National Treasury Employees Union v. Von Raab, 109 S.Ct. 1384 (1989), the Supreme Court ruled that a United States Custom Service program authorizing the random drug testing of its employees did not violate the Fourth Amendment. Because, by definition, "random" testing implies that the traditional probable cause would not exist prior to testing, the Court applied the balancing test and held that the "[G]overnment's compelling interests in safety and in the integrity of [the nation's] borders outweighed the individual privacy interests," specifically as applied to persons who carry firearms or are directly involved in the interdiction of drugs. It is on this basis that the federal Court of Appeals ruled in favor of the police commissioner in the Guiney case.

MASSACHUSETTS LAW

In the state court action in Guiney, the SJC also applied the balancing test but with an opposite result. The SJC, unlike the United States Supreme Court, refused to recognize as compelling the defendant's general assertion that random testing was necessary to preserve the integrity of the department, and maintain public confidence and safety. Rather, the Court stated that random testing was unconstitutional because there was no specific evidence that a drug problem existed in the Boston Police Department, that Boston Police Officers have ever used controlled substances, or that random drug testing would identify officers whose performance was affected by drug use. Therefore, the SJC ruled that the police commissioner failed to show the substantial governmental need necessary to justify the search and satisfy art. 14. The SJC expressly rejected the Supreme Court's reasoning in Von Raab, that "it is sufficient that the government have a compelling interest in preventing an otherwise pervasive societal problem from spreading to the particular context", stating that the justification for body searches could never rest on a generalized concern for the drug problem in this country.

The SJC is the highest authority in interpreting and applying state constitutional law. Although a state court, in interpreting the state constitution, cannot provide less rights than those provided in the United States Constitution, it can provide greater constitutional protections. In Guiney the SJC based its decision solely on state constitutional grounds, and interpreted art. 14 as providing greater constitutional protections than those afforded by the Fourth Amendment. It makes no difference, therefore, what the United States Supreme Court or any other jurisdiction decide with respect to this issue. The Guiney decision is controlling in the Commonwealth of Massachusetts unless and until the SJC reverses itself.

OTHER ISSUES NOT DECIDED

Although the Guiney decision clears up once and for all the issue of whether the random drug testing of police officers is constitutionally permissible in the Commonwealth of Massachusetts, the decision leaves unanswered a number of other compelling questions. These include: (1) whether the drug testing of police officers under the reasonable suspicion provision of rule 111 is permissible; (2) whether random testing is constitutional if part of a collective bargaining agreement; and (3) whether it is permissible to drug test other public employees on either reasonable suspicion or on a random basis.

(1) In Guiney, only the random aspect of rule 111 was challenged and therefore the SJC did not rule on whether urinalysis testing of police officers based on reasonable suspicion is permissible. Reasonable suspicion is that type of evidence which, while not creating probable cause to search or seize, is sufficient to warrant a threshold inquiry, or "stop and frisk." Reasonable suspicion of drug use alone is insufficient to justify a search as intrusive as urinalysis testing. Horsemen's Benevolent & Protective Association, Inc. v. State Racing Commission, 403 Mass. 692, 705-06 (1989). There is language in the Guiney decision, however, as well as language in another SJC decision, which indicates that drug tests administered to police officers on the basis of reasonable suspicion may be considered permissible. See O'Connor v. Police Commissioner, 408 Mass. 324 (1990) (SJC held that random drug testing of police cadets as condition of employment was constitutionally permissible). In both O'Connor and Guiney the Court recognized that there are legitimate governmental interests in public safety and in the preservation of the integrity of law enforcement. Although the SJC was not willing to find that such a general governmental interest was compelling enough, standing alone, to justify the random drug testing of police officers, that interest together with a finding of reasonable suspicion may be found sufficient to satisfy art. 14.

(2) Given the state of the law with respect to consent searches, it is unlikely that the right to be free from random drug testing could be bargained away. A person may waive his or her right to be free from an unreasonable search and seizure. To be a valid waiver, however, the consent must be obtained prior to the search and it must be freely and voluntarily given. Whether consent is valid is determined on a case by case basis, taking into account such things as the person's age, intelligence, and physical and mental health. It is the Commonwealth's burden to prove consent by "clear and convincing evidence." Because the adequacy of consent given for a warrantless search is determined on such an individualized basis, it is unlikely that the SJC would find that the union approval of a collective bargaining agreement containing provisions for random drug testing would be sufficient proof of consent on the part of any individual officer. It is conceivable, however, that if the random drug testing provisions of the contract were personally endorsed in writing, by each of the members, the SJC may rule that there is sufficient proof of consent.

(3) Finally, the SJC's decision in Guiney indicates that the Court would never uphold the random drug testing of other public employees, and is unlikely to uphold urinalysis testing based upon reasonable suspicion with respect to most public

employees not engaged in public safety functions. First, with respect to random testing, because it is difficult to imagine a more compelling governmental interest than public safety and the integrity of law enforcement, it is reasonable to infer that the SJC will never uphold random urinalysis testing in the absence of specific evidence of a substantial drug problem within a given community of employees. With respect to urinalysis testing based on reasonable suspicion, there are very few state jobs which carry with them the type of public protection concerns existing in law enforcement. Firefighting perhaps is the best example of a position which is most like law enforcement in that similar public protection interests exist whereby the SJC may find that reasonable suspicion coupled with the legitimate governmental interest satisfies art. 14. Absent a close connection between the position sought to be drug tested and public safety, the Court is unlikely to uphold a search based upon anything short of a traditional finding of probable cause.

THE AMERICANS WITH DISABILITIES ACT

By: Stanley J. Eichner
Assistant Attorney General, Civil Rights Division

INTRODUCTION

On July 26, 1990, the President signed the Americans with Disabilities Act ("ADA"), a landmark statute which some disability advocates have characterized as their "Magna Carta". The ADA will have far-reaching effects on the way in which many entities--private and public--must operate. As governmental entities involved in law enforcement, your agencies are subject to the mandates of the ADA. Since Massachusetts already has some of the strongest laws protecting the rights of people with disabilities, in many respects enactment of the ADA will not significantly alter the obligations under which your organization already functions. In other respects, the ADA might require you to modify some of your agency's practices and policies. The following question and answer format presents the essential features and requirements of the statute, and how they may impact you.

If you have questions that are not addressed below, please contact the Civil Rights Division of the Office of the Attorney General. We will try to respond or refer you to other resources. We hope this information will assist everyone in understanding their obligations under the ADA.

WHAT DOES THE ADA COVER?

The ADA consists of five different titles or sections, each of which covers a different area or entity. Title II, which covers "public entities," is the relevant title for virtually all of your organizations. "Public entity" is defined as "any state or local government; any department, agency, special purpose district or other instrumentality of a state...or local government."1/

The other titles cover: employment (Title I), public accommodations (Title III), and telecommunications (Title IV).

WHAT DOES TITLE II OF THE ADA PROVIDE?

Title II states:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the

1/ 42 U.S.C. §12131.

> services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.[2]

Many of you who have received federal funds in the past are familiar with the prior major federal statute prohibiting discrimination against persons with disabilities, Section 504 of the Rehabilitation Act of 1973 ("§504").[3] You might recognize the Title II language as being virtually identical to that of §504. (You might also recognize the language as being almost identical to the text of Amendment Article 114 to the Massachusetts Constitution, which became effective on December 10, 1981).[4] In enacting the ADA, Congress extended the non-discrimination provisions of §504 (which prohibited programs that received federal financial assistance from discriminating against persons with disabilities), to all public entities, regardless of whether they receive federal financial assistance.

WHO IS COVERED BY THE PHRASE "QUALIFIED INDIVIDUAL WITH A DISABILITY"?

The standard for who is protected by the ADA was purposely drafted to be a very broad and inclusive one. "Individual with a disability" is defined as someone who a) has a physical or mental impairment that limits one or more major life activities (such as performing manual tasks, walking, seeing, hearing, speaking, or working); or b) has a history of such an impairment; or c) is regarded or perceived as having such an impairment (even if the person does not have an impairment).[5]

A person is a qualified individual with a disability if that individual, with or without reasonable modification to the rules, policies, or practices of the public entity, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities of the entity. Other reasonable modifications include the removal of architectural, communication, or transportation barriers, or

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2/ 42 U.S.C. §12132.

3/ 29 U.S.C. §794.

4/ For a discussion of Amendment 114, see Crane, The Massachusetts Constitutional Amendment Prohibiting Discrimination on the Basis of Handicap: Its Meaning and Implementation, 16 SUFFOLK U.L. REV. 49 (1982).

5/ 28 C.F.R. §35.104.

the provision of auxiliary aids and services.6/ As law enforcement agencies that provide services to all citizens within your particular jurisdiction, essentially all of your citizens with disabilities will meet the eligibility requirements for your services.

WHEN DO THE REQUIREMENTS OF THE ADA TAKE EFFECT?

All of the non-discrimination provisions of Title II, including the employment provisions, were effective as of January 26, 1992.

There are two additional points which relate to the question of implementation dates:

First, the Title II regulations, as they were originally proposed, provided that the employment provisions of Title II were not effective until July 26, 1992, the effective date of Title I of the ADA. After a strong negative response to that proposal, the Department of Justice changed the implementation date of the Title II employment provisions to January 26, 1992. Some of the early written materials, which were based upon the proposed regulations, mistakenly stated that July 26, 1992, was the effective date.

Second, as is discussed below, the provisions that address program accessibility provide two different effective dates, depending upon whether the facility is an existing structure or is newly constructed or altered. Facilities constructed after January 26, 1992, must be physically accessible. Structural changes to make existing buildings accessible must be completed within three years of January 26, 1992.

WHAT ARE THE NON-DISCRIMINATION IN EMPLOYMENT PROVISIONS OF TITLE II?

Similar to the provisions of Mass. G.L. ch. 151B, Title II of the ADA prohibits employment discrimination against qualified individuals with disabilities by public entities. If the applicant or employee needs a reasonable accommodation in order to perform the essential functions of the position, the employer is obligated to provide the accommodation, unless doing so would constitute "an undue hardship or burden." The undue hardship determination is intended to be flexible, depending upon the facts of an individual case. In making that determination, the key factors to be considered are: a) the overall size of the employer's business, including the number of employees, the number and type of facilities, and the size of its budget or available assets; b) the nature of the

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6/ Id.

employer's operation, including the composition and structure of the work force; and c) the nature and cost of the accommodation needed.

WHAT ARE THE PROGRAM ACCESSIBILITY REQUIREMENTS OF TITLE II?

Title II provides that no qualified individual shall, as a result of a public entity's inaccessibility, be excluded from participation in, denied the benefits of, or be subjected to discrimination in the services, programs, or activities of a public entity.7/ The regulations impose different accessibility obligations depending upon the category in which the facility falls: existing facilities or new construction and alterations.

Existing facilities: A public entity must operate each service, program, or activity, so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This principle is generally referred to as "programmatic accessibility." In essence it does not require that a public entity make every part of its existing facilities physically accessible, but instead requires that the programs and services which you administer be available to people with disabilities.

You are not required to make structural changes in existing facilities where other methods are as effective in achieving compliance. Examples of such alternative methods include alteration of existing facilities and reassignment of services to accessible buildings or sites. In choosing among alternative methods of making your services programmatically accessible, the alternative chosen needs to be no less effective in terms of affording the person privacy and dignity. In addition, in choosing among methods, the public entity needs to give priority consideration to those methods which are consistent with providing services in the most integrated setting, i.e., that method which causes the minimal amount of separation from individuals without disabilities.

Nor are you required to take any action that would result in a fundamental alteration in the nature of a service, individual program, or activity, or impose undue financial and administrative burdens. Where the entity believes that compliance would impose undue administrative and financial burdens, or would fundamentally alter the nature of the program, that decision must be made by the head of the public entity, and be reduced to writing. That written statement must include the basis for reaching that conclusion.

7/ 28 C.F.R. §35.149.

New Construction and Alterations: New construction and alterations that are commenced after January 26, 1992 must comply with physical accessibility standards.8/

IS CARRYING AN INDIVIDUAL INTO AN INACCESSIBLE BUILDING AN ACCEPTABLE ALTERNATIVE METHOD OF PROVIDING ACCESS TO A PROGRAM?

The answer is almost always no. Carrying is permitted only in manifestly exceptional cases. That exception should not be viewed as being acceptable except in the most limited, emergency situation. Even in those instances, carrying is only permissible if all personnel who participate in carrying an individual with a disability are formally instructed on the safest and least humiliating means of carrying a person.

WHAT REQUIREMENTS DOES TITLE II IMPOSE WITH RESPECT TO COMMUNICATIONS?

A public entity is required to take appropriate steps to ensure that communications with members of the public with disabilities are as effective as communications with others. If the furnishing of appropriate aids and services is required in order for an individual with a disability to have an equal opportunity to participate, the entity is required to furnish those aids and services. Where the public entity communicates by phone with recipients of its services, it must utilize Telecommunication Devices for the Deaf (TDD's) or some other equally effective communication device. In Massachusetts, a telephone relay system for non-emergency telephone calls already exists.

WHAT ABOUT EMERGENCY COMMUNICATION SERVICES?

Telephone emergency services, including 911 services, must provide direct access to individuals who use TDD's and computer modems.

DOES THE ADA IMPOSE ANY TRAINING OBLIGATIONS ON PUBLIC ENTITIES?

While the statute does not impose any explicit training requirements on public entities, the legislative history of the ADA makes clear that there may be some instances in which it is necessary to provide training to public employees about disability. The example cited in the legislative history refers to the possible improper treatment of persons with epilepsy who have been inappropriately arrested and jailed because police officers had not received proper training in the

8/ 35 C.F.R. §35.151.

recognition of and aid for seizures.[9] Further mishandling of the person, it points out, could occur after an arrest if a person with epilepsy is deprived of needed medication, causing further seizures. Such discriminatory treatment could be avoided by proper training.[10]

CAN A PUBLIC ENTITY RAISE AS A DEFENSE TO A CLAIM OF DISCRIMINATION UNDER THE ADA THAT THE PUBLIC ENTITY DID NOT INTEND TO DISCRIMINATE AGAINST THE INDIVIDUAL WITH A DISABILITY?

No, that is not an available defense. A key principle of the ADA is that the law addresses not only actions which were intentionally discriminatory, but also practices or policies which have a discriminatory effect. Although a policy may be completely well-intentioned, it violates the ADA if its effect is discriminatory. The statute prohibits a public entity from using "criteria or methods of administration" that deny a person access to an entity's services, programs, or activities. The phrase "criteria or methods of administration" refers to official written policies as well as actual practices. It prohibits blatantly exclusionary policies and practices, as well as those policies or practices that may be neutral on their face but deny an individual an opportunity to participate.

DOES THE ADA REQUIRE A PUBLIC ENTITY TO CONDUCT A SELF-EVALUATION?

Within one year of January 26, 1992, a public entity must evaluate its current services, policies, and practices to examine the extent to which they do not conform to the requirements of the ADA.[11] The self-evaluation process requires that the entity provide an opportunity for interested persons, including persons with disabilities, to participate in the process by submitting comments. If the entity has already complied with the self-evaluation process under §504, then it is only required to conduct a self-evaluation for any practices and policies not included in the prior self-evaluation.

CONCLUSION

The above summary attempts to answer some of the most common questions that arise concerning the ADA. Agencies that have further questions are encouraged to contact the Civil

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9/ H.R. Rep. No. 101-485(III) 101st Cong., 2nd Sess. 51 (1990).

10/ Id.

11/ 28 C.F.R. §35.105.

Rights Division of the Office of the Attorney General. We will try to respond or refer you to other resources. By disseminating information on the requirements of this important new civil rights statute, we hope to be able to assist everyone in understanding and meeting their obligations under the Americans with Disabilities Act.

PERIODIC TESTING OF BREATHALYZER MACHINES

By: LaDonna J. Hatton
Assistant Attorney General, Criminal Bureau

In Commonwealth v. Barbeau, 411 Mass. 782 (1992), the Supreme Judicial Court held that prior to the admission into evidence of the results of a breathalyzer test, the Commonwealth must prove the existence of, and compliance with, the requirements of a periodic testing program. In Barbeau, six defendants filed motions in limine seeking to exclude breathalyzer results unless the Commonwealth could show compliance with Massachusetts statute and regulations which require periodic testing of breathalyzer machines. The Commonwealth attempted to prove compliance with these requirements by introducing the annual certifications from the Office of Alcohol Testing (OAT), and a letter from the director of OAT stating that the machines were in compliance with the regulations and that no decertification forms were found in the OAT files at the time the tests were administered to the defendants.

The statute and regulations governing the performance, and introduction into evidence, of breathalyzer tests mandate a periodic testing program and compliance with the program. G.L. c. 90, §24K; 501 C.M.R. §2.41. However, as the SJC noted in Barbeau, at the time of that case there was no written regulation setting forth a periodic testing program. Moreover, the Commonwealth did not introduce any evidence in that case to show that there in fact was a periodic testing program or that the police departments involved were in compliance with the program.

On February 14, 1992, the Department of Public Safety promulgated a regulation setting forth the requirements of the periodic testing program. The text of the regulation is as follows:

2.41: Periodic Testing

(1) For purposes of these regulations, every calibration standard analysis of a breath testing device, as conducted pursuant to 501 CMR 2.56, shall be deemed to be a test of such device.

(2) The officer in charge, as defined in 501 CMR 2.54, will change the simulator solution in accordance with the guidelines for storage, handling and replacement of simulator solutions as defined in 501 CMR 2.43.

(3) When changing the simulator solution, the officer in charge shall run five calibration standard analyses. In

order to be valid the test results must be 0.14%, 0.15%, or 0.16%. Any third or subsequent decimal places are to be truncated.

(4) The test results will be recorded as Calibration Records in the third section of the maintenance and use log as required by 501 CMR 2.54.

(5) If the solution is changed and results obtained are not 0.14%, 0.15%, or 0.16% the instrument must be recertified by the Office of Alcohol Testing before it can be used for further evidentiary tests.

(6) The officer in charge shall semiannually submit to the Director of the Office of Alcohol Testing copies of records indicating compliance with 501 CMR 2.41 (1), (2), (3), and (4). After reviewing the submitted records, the Director of the Office of Alcohol Testing shall issue a certificate, valid for six months, indicating the breath testing device is in compliance with 501 CMR 2.41.

(7) For testing conducted prior to January 1, 1993, compliance with the requirements of 501 CMR 2.41 may alternatively be documented by records of calibration standard analyses appearing in the Calibration Section of the Maintenance and Use Log as required by 501 CMR 2.54, indicating test results of 0.14%, 0.15%, or 0.16%, truncating any third or subsequent decimal place.

The regulation satisfies the first portion of the requirement for the admission of a breathalyzer result -- that is, the existence of a periodic testing program. To prove compliance with the program, the prosecutor will have to rely upon the certificates issued by OAT every six months pursuant to paragraph six of the regulation, and possibly upon the records of the tests maintained in the Maintenance and Use Log by the officer in charge.

For testing conducted prior to January 1, 1993, (which would include testing which took place before the Barbeau decision on February 11, 1992), the regulation provides that compliance with the requirements of the periodic testing program can be shown by records of calibration standard analyses in the Maintenance and Use Log indicating test results of 0.14%, 0.15%, or 0.16%. Therefore, until such time as your machines are certified under the semi-annual system set forth in paragraph six of the regulation, the Commonwealth must rely upon the records you have maintained in your Maintenance and Use Log to prove compliance with the periodic testing program.

RECENT CASES

I. SEARCH AND SEIZURE

A. Searches Pursuant To Warrant.

No-knock entry proper. Commonwealth v. Lopez, 31 Mass. App. Ct. 547 (1991). Police obtained a no-knock search warrant based on information from an informant. When the police arrived at the premises, the front door was wide open, and three males (including the two defendants) were visible. The lead officer announced, "Police officers, we have a search warrant, everyone stay where you are," as he crossed the threshold. The officers found a stash of cocaine in several locations, as well as money, notes, and other items.

The court also held that a no-knock entry was proper under the circumstances of this case. The entry was peaceful, through an open door permitting the unobstructed view of the defendants, and the police announced their presence and warned the occupants not to move. Therefore, the principles underlying the exclusionary rule (decreasing the potential for violence, protecting privacy, and preventing unnecessary damage to the home) were not threatened.

The court held that the informant was reliable, because the search warrant affidavit recited that on three prior occasions the informant provided information which "led to" the seizure of large amounts of contraband (heroin, cocaine, cash, and a hand gun).

Nightime search reasonable. Commonwealth v. Yazbeck, 31 Mass. App. Ct. 769 (1992). The court held that a search conducted at 10:45 p.m. was reasonable under the state constitution where: (i) the warrant authorized a nighttime search for narcotics; (ii) the police, upon arriving at the house, observed that the television was on; (iii) the police knocked and announced repeatedly before entering; (iii) all occupants of the house were dressed; and (iv) the defendant had previously arranged, in the presence of an undercover police officer, a meeting for 11:00 p.m. Although the Court observed that nighttime searches, "particularly if forceful", are potentially offensive, the court held that under the circumstances of this case, the search was tolerable.

Information not sufficient to establish informant's basis of knowledge. Commonwealth v. Byfield, 32 Mass. App. Ct. 912 (1992). The affidavit in support of a search warrant stated that within the past four days the informant was in the target apartment with a friend. The friend asked for a "forty," gave a woman forty dollars, and the woman went into another room and returned with a paper packet. The informant also generally described the building in which the apartment was located. A

police officer conducted surveillance of the location and saw several young black males enter the building, stay a moment or two, them exit the building.

The court concluded that this information was not sufficient to establish the informant's basis of knowledge. There was no indication in the affidavit that the transaction observed was either known by the informant or the affiant to be a drug transaction. The court noted that if the affiant had particular expertise in identifying this type of transaction as one involving drugs, that expertise should have been disclosed in the affidavit. In holding that the information in the affidavit was not sufficient, the court also noted that the description of the building could be obtained by a passerby, and therefore added little to the informant's basis of knowledge, the affidavit did not state that the observations of the officer during surveillance were consistent with drug activity, and the affidavit did not state which of the three apartments in the building the men were entering.

Probable cause should be determined by considering documents incorporated by reference in search warrant affidavit. Commonwealth v. McRae, 31 Mass. App. Ct. 559 (1991). The application for a search warrant was accompanied by an affidavit and an attached "wanted" form containing a composite picture and description of the assailant. The defendant argued that fruits of the search of his apartment, specifically a brown leather jacket, three hats, and a folding buck knife, should be suppressed because the affidavit, on its own, did not sufficiently establish probable cause.

The victim's description of the assailant in the affidavit did not mention that he was wearing a brown leather jacket and ski cap at the time of the assault. The only mention of this clothing in the affidavit was in reference to the police officer's interview of the defendant, where he denied ownership of that clothing. The composite picture attached to the affidavit, however, contained the victim's description of the assailant, indicating that the attacker was wearing a brown leather coat and a knit ski hat.

The court held that the entire application for the search warrant should be considered when determining whether probable cause is established. The attached composite and accompanying description of defendant was, in effect, incorporated by reference in the affidavit, which described its creation and referred to it as "attached."

The court also held that, although there was no description of the place to be searched within the search warrant affidavit, the description was contained in the application for the search warrant, and referenced in the affidavit. The magistrate could properly consider all of the documents in considering whether there was probable cause for the search.

Information from an informant which led to three prior arrests does not establish reliability. Commonwealth v. Mejia, 411 Mass. 108 (1991). The court held that the search warrant affidavit failed to include sufficient detail about the prior reliability of the informant who provided the tip which was the sole basis for issuance of the warrant. The affidavit stated that on three separate and specified occasions during one month, and in the defendant's community, the informant had provided information to the police that led to the arrest of a named individual for possession of cocaine with intent to distribute. The affidavit supplied no other detail of the informant's veracity other than the fact of the three prior arrests.

The court held that it could not be inferred that the prior tips had proven correct just because the tips "led to arrests," or that the police had seized drugs in connection with the prior arrests merely because the arrests were for possession with intent to distribute. The court distinguished this affidavit from ones which alleged that prior tips led to arrests and the seizure of controlled substances, or led to arrests and convictions of named individuals. The court also held that the informant's reliability could not be inferred from the fact that the informant had assisted in the arrests of three named individuals in the same city in the same month. The court concluded that three arrests, standing alone, do not establish the informant's reliability.

Information from informant which led to two prior arrests, one for trafficking, did not establish reliability. Commonwealth v. Santana, 411 Mass. 661 (1992). Here, as in Commonwealth v. Mejia, a defendant's conviction for drug trafficking was set aside because the search warrant affidavit failed to establish the informant's prior reliability. The affidavit indicated that the informant had provided information in the past which led to the arrest of Mejia for trafficking, and another named individual for possession with intent to distribute. The affidavit did not indicate that the information led to the seizure of cocaine, which would be a reason to believe that the tip had been correct, and did not otherwise describe what role the informant played in the prior arrest. An argument that since the affidavit stated that Mejia was arrested for trafficking, it could be inferred that a large quantity of drugs were seized, was rejected by the court. The fact that the police had also received two phone calls from an anonymous caller indicating that someone was dealing drugs from the defendant's apartment did not sufficiently corroborate the informant's tip.

Probable cause established by police investigation and information from reliable informant. Commonwealth v. Cacicio, 31 Mass. App. Ct. 943 (1991). On September 11, the Revere

police, responding to a reported breaking and entering, confiscated a shotgun from Steven Hunt in the downstairs apartment at 106 Pomona Street and a scale in the defendant's upstairs apartment. On September 24, the defendant was arrested in Somerville, and 45 grams of cocaine were found in his car. Also on September 24, the Pomona Street apartments were again searched; a shotgun barrel was found in Hunt's apartment, and drug paraphernalia and cocaine residue were found in the defendant's apartment. On November 15, the informant told the police that Hunt was dealing cocaine from his apartment. On November 18, the informant told the police that he had seen people doing cocaine in the basement apartment. The police conducted a "loose surveillance" at 106 Pomona Street and saw traffic arrive and leave shortly thereafter.

The court held that this information established probable cause for the search of the defendant's apartment. The drugs found in the defendant's car justified the inference that he was a drug dealer, and the drug paraphernalia found in his apartment in September justified the inference that his apartment was a base for his drug operations. An inference that Hunt was a drug dealer was justified by the observations of the informant, corroborated by police observations and the presence of a shotgun in his apartment. The informant's reliability was established by having given past information which led to arrests and convictions, and to corroboration of some of the information by police surveillance.

B. Warrantless Searches.

Independent police corroboration made up for deficiencies in veracity and basis of knowledge in informant's tip. Commonwealth v. Ramon, 31 Mass. App. Ct. 963 (1992). The informant told police that two identified males were going to meet a Puerto Rican male to consummate a drug sale. The informant specified the exact time and place of the meeting, as well as the license plate of the car that the men would be driving. The informant failed, however, to tell the police how it acquired this information. Further, the informant's past reliability was not established because it had given information in the past which led only to the arrest (but not the conviction) of a named individual on drug charges. Based on these facts, the court Court found that the informant did not satisfy either the basis of knowledge or veracity prong of the Aguilar-Spinelli test.

The court concluded, however, that there was sufficient independant police corroboration of the informant's information to satisfy the Aguilar-Spinelli test. Specifically, a detective observed the two males, known to him for drug involvement, meet with a Puerto Rican male at the exact location and time suggested by the informant. In addition, the

man arrived in the car described by the informant bearing the same license plate predicted by the informant. Finally, the detective observed an exchange of money.

Officers were justified in following the defendant's car, stopping it for traffic violations, and searching it for weapons. Commonwealth v. Nutile, 31 Mass. App. Ct. 614 (1991). Upon receiving information from a number of sources that a man named Paolino was trafficking in cocaine and was known to carry a gun, police began a surveillance of Paolino. Two officers in an unmarked cruiser saw the defendant sitting in the front passenger seat of a car parked in front of Paolino's house. The officers knew the defendant and also knew that he had been recently arrested for possession of cocaine with intent to distribute and assault and battery on a police officer. The police then saw Paolino run out of the house with a gun tucked in the waistband of his trousers.

Paolino got in the car and drove away, and the officers followed. The officers saw the defendant bend forward in his seat, then reach into the back seat. Both Paolino and the defendant watched the officers out the back window. Paolino went through a stop sign and followed a slow moving car from a distance of one foot, and the officers activated the cruiser's blue lights and siren. Paolino sped away, and a high speed chase ensued. During the chase, the defendant threw objects out of the window.

Paolino eventually stopped, and was arrested and frisked. The police did not find the gun on Paolino. They looked in the car and saw a pouch with a bulge hanging from the rear of the driver's seat. They reached in the pouch and found a round plastic container of cocaine. The defendant, Paolino, and the car were then searched.

Based on these facts, the court found that: 1) initially following Paolino and the defendant was not "pursuit," and was therefore proper; 2) the officer's decision to stop Paolino was justified on the basis that Paolino had committed two traffic violations; 3) once the car was stopped, the police properly asked Paolino to exit the car and frisked him in order to protect themselves, since they had seen Paolino with a gun earlier; and 4) when the gun was not found on Paolino, the search of the car and containers found therein was justified on the basis of exigent circumstances, since the gun was either in the car, therefore creating a danger to the police, or was thrown from the car by the defendant, therefore creating a danger to the public.

Police justified in entering onto private driveway and seizing car involved in hit and run accident. Commonwealth v. A Juvenile, 411 Mass. 157 (1991). Police were told that the defendant had been driving a car on the night of the hit and run accident under investigation which resembled one seen at

the scene by eyewitnesses. The police went to the defendant's home and saw, from the road, the car in the driveway, and noted that the front end was damaged. They then went onto the driveway and examined the exterior of the car. They saw fabric fibers and dents on the front of the car. Following that examination, the police seized the car and conducted a search of its exterior.

The court first held that the defendant had no reasonable expectation of privacy in the private driveway, relying on the factors that the driveway and the car were visible from the public way, the driveway was the normal route to the front door, and no steps had been taken to conceal the car from public view.

The court further held that there was probable cause for the warrantless seizure of the car based on the information from witnesses and the observations made of the car, and that there were exigent circumstances for the search given the inherent mobility of the car, and the fact that the defendant was not in custody and the police had no idea of his whereabouts. The court further held that, since exigent circumstances existed, the police were not required to post a guard at the car and obtain a search warrant.

Police did not "pursue" defendant by following him into public restroom. Commonwealth v. Laureano, 411 Mass. 708 (1992). The defendant was in a bar, talking with someone. Two plain clothes detectives entered the bar and stood side by side at the door. One made a visual sweep of the room, the other glanced at the defendant, who was thirty feet from the detectives. The defendant abruptly ended his conversation and went into the men's room, ten feet away. The detectives followed, arriving at the rest room less than three seconds after the defendant. The defendant was near a urinal, but not using it. One detective saw a small bag of white powder in the urinal, and retrieved it. The defendant spun around and started to leave, and was then arrested.

The court held that the detectives did not "pursue" the defendant into the men's room, since they did not attempt to restrain the defendant from leaving the bar or make any other manifestation of authority, but merely followed him into a public rest room where they had a right to be. Once in the public rest room, the detectives saw the bag of white powder in plain view, and at that point had probable cause to arrest the defendant.

Informant's information failed to establish basis of knowledge, and corroboration of innocuous details was insufficient to establish probable cause. Commonwealth v. Brown, 31 Mass. App. Ct. 574 (1991). The informant told the officer that the defendant, whose appearance the informant specifically described, would arrive at the Back Bay Amtrak station on a

train from New York at approximately 9:15 that evening. The informant also indicated that the defendant would be dressed casually and wearing glasses, and would be carrying cocaine. In fact, the defendant arrived at the station on a train that was to arrive from New York at 9:15. His appearance fit the description given by the informant. The officers stopped the defendant and found a kilo of cocaine in a bag he carried over his shoulder.

The court held that not only did the informant's information failed to reveal his basis of knowledge, but the corroboration of the tip by the police did not make up the deficiency in the information. The informant did not give a detailed description of the defendant's clothing or state that he would be carrying a shoulder bag. The corroboration of "innocuous detail" was insufficient to support a finding of probable cause.

Trooper had probable cause to search and arrest driver where passenger possessed drugs, and paraphernalia was strewn throughout car. Commonwealth v. Sabetti, 411 Mass. 770 (1992). Upon seeing trash being thrown from a car parked in a Burger King parking lot, a state trooper positioned his cruiser perpendicular to the car so that its headlights shone at the car. The defendant, who was sitting in the driver's seat, denied throwing the trash. The trooper, aided by a flashlight, saw through the passenger-side window several items in the passenger's breast pocket, including a medicine vial bearing the name "Janet" on the label, a folded piece of glossy paper, a section of plastic straw, a small metal aspirin tin, and a small amber vial which appeared to contain a white powdery substance. The trooper recognized these objects as implements used to consume and distribute cocaine. The trooper also observed more medicine vials and various paraphernalia used for "freebasing" cocaine strewn throughout the car.

The trooper arrested the passenger and placed him in the cruiser, then searched the defendant, who by that time was standing outside the car, finding a bag of marijuana in his pants pocket. The defendant attempted to flee when the trooper told him he was under arrest. The trooper also saw, in the back seat of the car, a canvas gym bag with several plastic bags dusted with white crystalline powder protruding from an outside pocket. The car was towed to the police barracks, and during the inventory search, troopers found cocaine, prescription drugs, and drug paraphernalia. At booking, $1,090 was confiscated from the passenger, who appeared to be under the influence of narcotics.

Based on the facts that the passenger possessed narcotics and related contraband, that prescription medicine vials and drug paraphernalia were strewn throughout the car, including the driver's seat area, and that the car was parked in a relatively isolated area, likely in an effort to avoid

detection while ingesting narcotics, and the passenger appeared to be under the influence of narcotics, the trooper could reasonably conclude that the defendant at least constructively possessed contraband, and therefore was properly arrested and searched.

II. NARCOTICS OFFENSES.

A. Disclosure Of Informant's Identity.

Identity of informant should have been disclosed where informant was active participant and only nongovernment witness. Commonwealth v. Healis, 31 Mass. App. Ct. 527 (1991). The defendant was convicted of trafficking in cocaine in excess of fourteen grams. Prior to trial, the defendant moved to have the Commonwealth disclose the name, address, and criminal record of the individual (a male informant) who allegedly purchased cocaine from the defendant.

The police informer, known to the defendant only by his first name, "Orlando," met with the defendant at a pre-arranged time and location. Under the observation of two police officers "Orlando" had a conversation with the defendant on the street. The informer then left and the defendant was arrested shortly thereafter after the police found 27.86 grams of cocaine under the front seat of the defendant's car. The Commonwealth's theory was that the defendant arranged to meet the informer to sell him the drugs found in the car.

The defendant testified at trial and maintained that he had intended to buy, not sell, cocaine from "Orlando." He stated that when he arrived at the agreed location, "Orlando" came running out of a restaurant and dropped the bag of cocaine onto the floor of the defendant's car. Thus, the critical issue at trial was whether the defendant was a buyer of a small amount of cocaine for his personal use or a seller of a large amount of cocaine.

Because "Orlando" was an active participant and the only nongovernment witness to the events which gave rise to the defendant's arrest, the court ruled that the defendant's motion to disclose "Orlando's" full identity should have been allowed. The court also held that there is no requirement that a defendant who has been denied access to evidence that might prove helpful in his or her defense must make a specific showing of how he or she was prejudiced by the withholding.

Defendant was not denied access to informant where prosecutor offered to provide address but defense counsel did not pursue matter further. Commonwealth v. Manrique, 31 Mass App. 597 (1991). The Commonwealth provided the defendant the name of the informer, and offered, during a hearing on the defendant's motion "to secure access to informer," to provide the defendant with the informant's address. The defense counsel, however,

never actually requested that the prosecutor provide him with the informant's address. The defendant argued that the failure of the prosecutor to actually follow-up on the offer to provide the address of the informant denied him access to the informant. The court held, however, that since the prosecutor offered to provide the defendant the address, and all defense counsel had to do was to ask the prosecutor for the address, the defendant was not denied access to the informant.

B. Evidence Of Possession.

Sufficient evidence of defendants' trafficking. Commonwealth v. Lopez, 31 Mass. App. Ct. 547 (1991). Drugs were found in various locations throughout the apartment, and $13,000 in cash was concealed behind a baseboard between the kitchen and bedroom. One defendant was found with cash in his pocket that had been given to a third person during a controlled buy from the same apartment earlier in the day, and was present in the apartment at the time of the controlled buy. The other defendant was arrested while attempting to flee the apartment with four bags of cocaine in his pocket, and his wallet was found in the apartment next to a price list for cocaine. Moreover, both defendants claimed to be unemployed. The court held that this was sufficient evidence of trafficking as to the two defendants.

Defendant did not "possess" drugs in bedroom admittedly used by another, but was found to have knowledge of drugs and paraphernalia in kitchen and shared bedroom. Commonwealth v. Rivera, 31 Mass. App. Ct. 554 (1991). A large quantity of drugs were found in a dresser drawer and in a jacket hanging in the smaller bedroom of the apartment searched, and a scale was found under the mattress in that room. Only men's clothing was found in that bedroom. A male occupant of the apartment admitted that the smaller bedroom was his, and admitted ownership of some of the drugs and of the jacket found in the smaller bedroom. There was no evidence that the female defendant had any connection to that particular bedroom. The court held that the defendant could not be convicted of trafficking in cocaine, where there was no evidence that she had possession of the larger quantity of drugs found in the smaller bedroom.

The court held, however, that there was sufficient evidence to find that the defendant was in constructive possession of drugs found in another, larger bedroom, which she shared with another co-defendant, where her personal papers and belongings were located throughout the room, including the closet in which the cocaine was found. Although the quantity of cocaine found in that larger bedroom was small (.5 grams), the court held that it could be inferred that the defendant had the intent to distribute that amount based on the paraphernalia found in that

room and in the kitchen. The defendant's knowledge of the drug paraphernalia found in the kitchen could be inferred because she was in the kitchen when the police arrived, and because one who occupies an apartment ordinarily uses and is familiar with the contents of the kitchen.

Presence during a search and knowledge that drugs are present does not establish possession. Commonwealth v. Caterino, 31 Mass. App. Ct. 685 (1991). The defendant's conviction was overturned because there was insufficient evidence of his actual or constructive possession of cocaine seized during the search of an apartment in which he was present. The court held that the following facts were not sufficient to establish possession: 1) the co-defendant, whose apartment was being searched, stated to the defendant when the police arrived that they "wanted the drugs;" 2) a witness told police that the defendant could be contacted at that apartment; 3) a pill was found on the defendant which matched pills found in the co-defendant's apartment in a man's sweater which also contained "crack" cocaine; and 4) while the co-defendant's apartment was being searched, the defendant's own apartment was being searched, and the defendant stated that he had known about the search for two weeks and that the police would not find anything in his apartment. There was no evidence of anyone seeing the defendant regularly at the co-defendant's apartment, and there were no personal effects of the defendant found. The court noted that although the evidence permitted the conclusion that the defendant knew the drugs were present, knowledge of the presence of drugs alone does not establish possession.

Sufficient evidence of possession. Commonwealth v. Yazbeck, 31 Mass. App. Ct. 769 (1992). There was sufficient circumstantial evidence of possession in addition to the defendant's "mere presence" in the house to affirm the defendant's conviction for trafficking in marijuana. The court considered the following factors relevant to such a determination: 1) the defendant had previously purchased marijuana from an undercover police officer at the same house and had discussed further purchases with the officer; 2) the defendant admitted to owning a briefcase that contained cocaine; 3) the defendant was familiar with the house where the drugs were seized and his personal belongings were located throughout the house; 4) the basement, in which the marijuana was found, was accessible from the first floor of the house and clearly used by the occupants; and 5) the defendant must have known of the marijuana because it emitted a noticeable odor. From this evidence, the jury could infer "possession."

Proximity to drugs not sufficient to infer possession or control. Commonwealth v. Booker, 31 Mass. App. Ct. 435 (1991). The police, who saw Booker struggling outside her apartment building with two men, one armed with a gun, chased that man into Booker's apartment. Inside the apartment on the floor protruding from beneath the couch were two baggies of cocaine. The only connection between Booker and the cocaine was its presence in her apartment.

The defendant's conviction for trafficking in cocaine was reversed because there was insufficient evidence to support a finding of "constructive possession"--that the defendant knew of the presence of the cocaine and had the ability and intention to exercise dominion and control over it. The court held that proximity to the drugs, even if the defendant knew they were there, does not establish possession unless they permit an inference that the defendant controlled the drugs. Here there was no evidence warranting an inference of control, nor was there other incriminating evidence sufficient to support an inference of possession. The court provided examples of what would constitute sufficient incriminating evidence, such as the defendant's presence in the apartment at the time of discovery of the drugs, actions showing consciousness of guilt, carrying paraphernalia or large amounts of cash, exclusive access to the apartment, or drugs found in proximity to the defendant's effects in the apartment.

Sufficient evidence that defendant brought drugs into state. Commonwealth v. Manrique, 31 Mass App. 597 (1991). The defendant argued that the evidence failed to prove trafficking because it did not show that he had brought into the state the drugs which were found in his car. The court held, however, that the following facts were sufficient to allow the jury to infer that the defendant drove into the Commonwealth from another state: the defendant was found in an out-of-state car in a rest area on a major highway, admitted to living outside the Commonwealth, and had clothing, toiletries, and maps in his car. The court noted that there need not be testimony of an observed territorial crossing in order to establish that the defendant brought the drugs into the state.

III. ADMISSIONS AND CONFESSIONS

A. Not Entitled To Miranda.

Not entitled to Miranda warnings before routine questioning at scene of accident. Commonwealth v. Downs, 31 Mass. App. Ct. 467 (1991). Police arrived at an accident scene in a parking lot. The defendant told the police that he backed into a parked car and sent it into a collision with a third car. One of the officers thought that the defendant was drunk and asked where he had come from. The defendant said he came from a bar,

and said that he had had one drink. The defendant argued that he was entitled to Miranda warnings before he made the statement that he had been drinking at a bar. The court held, however, that the defendant was not entitled to Miranda warnings since there was no custodial situation. The conversation between the police and defendant was initiated by the defendant, and questioning at the scene of an accident is a routine first step used by police to decide what to investigate. Moreover, no atmosphere of intimidation or custodial situation was created by the time, place, or conduct of the questioning in this case.

B. Waiver Of Miranda Rights.

Police properly advised Spanish-speaking defendant of Miranda rights, but it was error to resume questioning six months after he invoked right to counsel. Commonwealth v. Perez, 411 Mass. 249 (1991). The court held that it was proper to advise a Spanish-speaking suspect of his rights by letting him read a printed card with Miranda warnings in Spanish. The police gave the defendant the card, he read it and indicated in English that he understood the warnings. A Puerto Rican officer then read the defendant his rights in Spanish, and the defendant responded in English that he understood.

The defendant was questioned twice in Puerto Rico upon his arrest; the second time he indicated he wanted an attorney and questioning stopped. Upon his extradition to Massachusetts six months later, police again gave him his rights and resumed questioning about the same crime. The court concluded that the resumption in questioning following the defendant's request for a lawyer would probably violate the defendant's federal constitutional rights despite the lapse of time and the fact that the warnings were renewed. The error was harmless, however, in view of the facts that the statements obtained in the second round of questioning provided no new evidence and that the case against the defendant was extremely strong.

C. Adoptive Admissions.

Defendant's silence following witnesses's statements admissible as "adoptive admission." Commonwealth v. Ferrara, 31 Mass. App. Ct. 648 (1991). The court held that two statements made to officers by two individuals other than the defendant at the scene of the search were properly admitted into evidence. The defendant denied that he had anything to do with the office where $25,000 worth of drugs were found. During the search, one person in the office told the officers that he worked for the defendant, and the building owner said that he leased the office to the defendant. Because the defendant made no response after hearing these statements suggesting that he possessed the premises, his failure to respond was considered

an "adoptive admission" that he possessed the premises, and was therefore admissible in court.

The court emphasized that no admission by silence may be inferred if the statement is made after the defendant has been arrested, after Miranda rights have been read, or after the defendant has been so deprived of freedom that he or she may be considered in police custody. However, none of these factors were present in this case.

D. Corroboration of Confession

Prior inconsistent statement of victim not sufficient corroboration of defendant's two confessions. Commonwealth v. Costello, 411 Mass. 371 (1991). In a prosecution for rape of a child under 16 and indecent assault and battery on a child under 14, the defendant confessed on two separate occasions to two different people, who testified at trial. At trial the victim took the stand and denied that the alleged offenses had occurred. The Commonwealth then impeached the victim with two witnesses who testified to the details of the rapes as the victim had told them.

The SJC held that the defendant's confessions had not been substantively corroborated, because the victim's testimony did not confirm the detail of the defendant's confession that proved that a crime had been committed, and the testimony concerning the victim's statements to the two witnesses was only admitted for impeachment purposes, since there is no hearsay exception allowing the use of this type of testimony substantively. According to the SJC, because the two confessions were not substantively corroborated, the Commonwealth had not proved that a crime was committed.

IV. IDENTIFICATION

Inappropriate post-identification comment by police did not taint photo identification or in-court identification. Commonwealth v. Ayles, 31 Mass. App. Ct. 514 (1991). The court held that even if an officer told the victim, before she selected the defendant's photo from a photo array, that he had a suspect in mind, that was not "unduly suggestive." The court stated, however, that it was clearly inappropriate for the officer, following the victim's identification of the defendant, to tell her that the person chosen was a suspect in other cases. However, since the victim's identification of the defendant's photo was certain, unhesitant, and unaffected by any information from the police, the officer's inappropriate statement did not unduly taint the in-court identification.

Out-of-court accidental identifications were not unduly suggestive. Commonwealth v. Otsuki, 411 Mass. 218 (1991). A police officer identified the defendant as the suspect who had

fled from the scene when he recognized the defendant's picture on a wanted poster. At trial, the defendant argued that the viewing of the wanted poster was a highly suggestive circumstance and tainted the identification. Because the viewing of the poster was unintentional and accidental, and because the police had made no attempt to elicit an improper identification from the officer, the motion to suppress was properly denied.

Before trial, a civilian eyewitness to the crime identified the defendant as the suspect when he happened upon the defendant's photograph in a newspaper. The court held that in the absence of "police manipulation" of the press, a witness's mere exposure to the media is not sufficient ground to suppress an identification. To justify suppression, the defendant must show that a witness was subjected by the state to an identification so unnecessarily suggestive and conducive to irreparable misidentification as to deny the defendant due process of law. In this case, there was no evidence that the police were involved in the witness's identification of the defendant.

V. MISCELLANEOUS

Officer's arrest of defendant for felony outside jurisdiction was proper citizen's arrest. Commonwealth v. Dise, 31 Mass. App. Ct. 701 (1991). A Ludlow police officer received a radio broadcast from the Wilbraham Police Department in regard to a purse snatching which had just occurred. According to the dispatch, three black male suspects were in a Datsun-type vehicle with a white stripe, heading toward Ludlow. The Ludlow officer saw a vehicle matching this description driven by a lone black male make an illegal left turn at a red light in Ludlow. The officer began pursuit of the defendant by activating his blue lights, but the defendant did not come to a stop until after he had crossed into Springfield. When the officer approached the car, he saw the other two men slumped down in their seats.

The court held that the officer had probable cause to believe that the defendant had committed a felony based on the information from the radio broadcast. The court concluded that the arrest of the defendant in Springfield by a Ludlow police officer was lawful as a citizen's arrest since he had probable cause to believe a felony had been committed, and the evidence obtained as a consequence thereof was properly admitted at trial.

The court did not consider whether the traffic violation in this case fell within G.L. c. 41, §98A, which permits extraterritorial "fresh pursuit" arrests for arrestable offenses committed in the arresting officer's presence. The court noted that as a precautionary measure police departments

should have their officers sworn in as special officers on the police forces of neighboring municipalities.

Officers' testimony about search warrant application process admissible. Commonwealth v. Ferrara, 31 Mass. App. Ct. 648 (1991). The court held that there was no reversible error when two Boston police detectives testified in detail at trial about the application for and subsequent granting of a search warrant. The court noted that some testimony about the search warrant application procedure is generally permissible to explain why police were present at the scene to conduct a search. Although in a prior case the court found that it was error for an officer to testify that a magistrate had found probable cause and approved the warrant, no such testimony was given in this case.

United States Supreme Court strikes down New York's "Son of Sam" law. Simon & Schuster, Inc. v. Members of the New York State Crime Victims, 112 S.Ct. 501 (1991). The United States Supreme Court held that New York's "Son of Sam" statute violates the First Amendment. The statute mandates that an entity contracting with an accused or convicted person for a depiction of the crime (on the radio, television, or by publication) must turn over all proceeds to the Crime Victims Board.

The Massachusetts statute is significantly more narrow in scope than the New York law. Most importantly, the statute applies only to persons who are actually convicted of a crime. The statute provides that any entity contracting with a person for a depiction of their crime must turn over proceeds otherwise owed to that person under the contract to the state treasurer who deposits such money in an escrow account. The treasurer must publish a legal notice every six (6) months advising victims that such moneys are available. The victim can recover money out of the account by filing a civil action within three (3) years against the criminal. The statute allows for money to be used to pay the criminal's attorneys' fees at any stage of the criminal proceeding, including appeal. After three years, any money remaining in the escrow account is returned to the convicted person or his/her legal representative.

It is unclear precisely what the effect of Simon & Schuster is on G.L. c. 258A, § 8. The Supreme Court did not enact a blanket prohibition on these types of statutes, noting that "Son of Sam" statutes in other states may be quite different from New York's. G.L. c. 258A, § 8 may survive constitutional challenge, in that it seems to avoid some of the problems the Court found with the New York statute, since it applies only to convicted criminals, and has a different procedure for payments. The Massachusetts statute does not, however, address the Court's concern that the crime be the central focus of the publication, and not merely referenced in a broader context.

ASSISTANCE AND CONTACTS AT THE OFFICE OF THE ATTORNEY GENERAL

Below is a description of bureaus and divisions within the Office of the Attorney General and individuals in those divisions who you can call for assistance. The main office number for all extensions listed below is (617) 727-2200. The office address is: Office of the Attorney General, One Ashburton Place, Boston, MA 02108.

Scott Harshbarger, Attorney General.....2042

John T. Montgomery, First Assistant.....2057

GOVERNMENT BUREAU

Bureau Chief: Dwight Golann.....2068

Administrative Law Division

Provides defense in lawsuits against state officials and agencies concerning the legality of governmental operations; initiates affirmative litigation on behalf of state agencies and the Commonwealth; provides legal review of all newly-enacted municipal by-laws, home rule charters, and amendments.

Deputy Bureau Chief: Douglas Wilkins.....2066

Opinions Unit

Issues formal opinions regarding legal issues raised by state officers, agencies, their departments, and district attorneys on matters relating to their official duties.

Chief: Peter Sacks.....2081

CRIMINAL BUREAU

Bureau Chief: Edward Rapacki.....2810

Environmental Strike Force

Works with the Executive Office of Environmental Affairs to investigate and prosecute the Commonwealth's environmental enforcement efforts.

Chief: Martin Levin.....2858

Division of Employment and Training

Investigates and prosecutes employers who fail to contribute to the unemployment fund and employees who make fraudulent claims.

Chief: Brian Burke.....727-6824

Criminal Investigation Division

Investigates major crimes, including theft of significant value, bribery, extortion, public corruption, and investigates organized narcotic networks in conjunction with the Narcotics Division. Assists District Attorneys and other local and State Police units with technical expertise on surveillance. Acts in conjunction with federal agencies in cases of mutual concern. Targets significant career criminals.

Chief: Lieutenant Edward Johnson.....2812

Medicaid Fraud Control Unit (M.F.C.U.)

Investigates and prosecutes allegations of fraud on the part of medicaid providers, such as nursing homes, doctors, pharmacies, laboratories, and other health care providers. Also investigates and prosecutes cases of patient abuse in long-term care facilities.

Chief: Michael Kogut.....3814

Narcotics Division

Investigates and prosecutes large-scale drug trafficking offenses, including multi-jurisdictional and long-term trafficking cases. Pursues civil and criminal forfeiture actions related to narcotics offenses. Assists drafting and lobbying for narcotics-related legislation.

Chief: R. Michael Cassidy.....2517

Asset Forfeiture Unit

Operates pursuant to statutory authority to forfeit property including money, real property, conveyances or other things of value which are used to commit or facilitate violations of the Commonwealth's narcotics laws, or are proceeds of such violations. Funds recovered by the unit are divided between the Attorney General's Office and state and local police and are earmarked for drug law enforcement efforts.

Chief: Maurice Cunningham.....2510

Public Integrity Division

Investigates and prosecutes public corruption cases: bribery, conflict of interest, procurement fraud, election law and campaign finance violations and related larcenies, tax crimes, and other violations of the public trust by government officials and by those dealing with public agencies.

Chief: Patricia Bernstein.....2856

Special Investigations Unit

Coordinates and prosecutes complex, multi-jurisdictional criminal cases including organized criminal enterprises.

Chief: David Burns.....3440

Economic Crimes Division

Investigates and prosecutes frauds and embezzlements, securities violations, state tax violations, as well as consumer fraud and public charities fraud.

Chief: Martin Healey.....2868

FAMILY AND COMMUNITY CRIMES BUREAU

Bureau Chief: Jane Tewksbury.....2049

Responsible for oversight and policy and program development in four areas: issues affecting children, juveniles and the elderly; domestic violence; issues involving crime victims; and supervision of the Victim Compensation and Assistance Division.

Victim Compensation and Assistance Division

Makes recommendations to the district court on claims filed under the state's Victims of Violent Crimes Compensation Act; provides support and referral services to victims; conducts education and training on victim compensation for community and victim rights organizations, for D.A. victim-witness advocates, and for court personnel. Processes all claims made by victims of violent crimes.

Chief: Susan Motika.....2878

PUBLIC PROTECTION BUREAU

Bureau Chief: Barbara B. Anthony.....2925

Antitrust Division

Enforces both federal and state antitrust laws and investigates any suspected violations of the law.

Chief: George Weber.....2970

Civil Rights/Civil Liberties Division

Seeks injunctive relief on behalf of victims of hate crimes. Involved in enforcing rights to fair and accessible housing, equal employment and equal educational opportunities, and equal credit. Involved in identifying patterns of unlawful conduct by police departments or by individual officers, so that we can offer training, request policy changes, and, if necessary, seek injunctive relief.

Chief: Richard Cole.....2964

Consumer Complaint Section

Receives and processes consumer complaints. Engages in informed mediation between consumers and business. Also, monitors consumer complaints for trends of unfair and deceptive business practices and makes referrals to the Consumer Protection Division.

Director: Louise Bessler.....3110

Consumer Protection Division

Enforces c. 93A and other consumer protection laws through litigation. Represents the public interest in housing, health care, financial services, automobile, and other cases. Concentrates on cases where large numbers of vulnerable consumers cannot reasonably obtain relief through their own efforts.

Chief: Robert B. Sherman.....2993

Environmental Protection Division

Represents the Commonwealth regarding environmental issues and the state agencies responsible for environmental laws. Initiates affirmative enforcement litigation when required.

Represents the state on safety issues regarding nuclear power plants.

Chief: Ann Berwick.....2550

Civil Investigation Division

Conducts all non-criminal investigations within the office, primarily for divisions within the Public Protection Bureau and Trial Division of the Government Bureau. Investigators locate and interview victims, witnesses and subjects of investigation; conduct asset checks, corporate record searches, and financial analysis; and review all other pertinent evidence.

Director: Carmen Russo.....2926

Local Consumer/Mediation Services

Manages statewide network of Local Consumer Programs and Face-to-Face Mediation Programs which work in cooperation with the Office of the Attorney General to resolve consumer complaints. Identifies patterns of unfair/deceptive business practices and brings information to attorneys for legal action. Operates peer mediation programs in high schools where student mediators resolve disputes for fellow students.

The Director's position is currently vacant. However, for information you can call: Carrie Doherty.....2573

Public Charities Division

Ensures that funds donated for charitable purposes are actually used for those purposes. Charitable organizations must file with this division, which examines and reviews the annual reports of such organizations and foundations. Fundraisers must also register and file. Investigates complaints of possible fraud and deception, and enforces compliance with the laws regulating the activities of these charities and fundraisers.

Chief: Richard Allen.....2110

Regulated Industries Division

Represents ratepayers before the Department of Public Utilities and Federal Energy Regulatory Commission, and works to keep utility services affordable. Develops utility rate policy, legislative initiatives, and litigation strategy in electric, gas, and telephone proceedings. Seeks to keep the cost of automobile, health, life, and disability insurance affordable and attainable for all citizens of the

Commonwealth. Represents the public at administrative and legislative hearings. When consumers have been injured by fraudulent sales practices or short-changed in coverage, the division brings suit to restore benefits or recoup investments.

Chief: George Dean.....3320